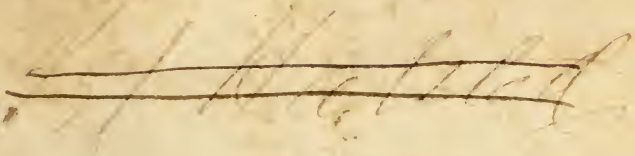

Cotton, Henry G.
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A TREATISE

ON THE

POWERS AND DUTIES

OF

JUSTICES OF THE PEACE

IN

THE STATE OF ILLINOIS,

WITH

PRACTICAL FORMS.

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as a standard my own notions of right and wrong. But I can do no such thing. I am called to the severer and more humble duty of laborious examination and study. It was Lord Bacon who laid it down as the duty of a judge, to draw his learning from books and not from his own head."

As in the remedy consisteth very much the law, it concerns every well meaning justice who takes upon himself the responsibility of judging between individuals and determining their rights, to make himself acquainted with the rules of proceeding in the various matters and suits which may be brought before him. "That courts of justice should be conducted without rules, and should decide without established principles, is of all speculations the most wild and pernicious. To substitute, in the place of settled law, the whim, the caprice, the affection, the inclination, or, what nine times out of ten is the same thing, the conscience of the judge, is to unhinge the long established rules of personal rights and of property, and to launch into a deceitful, fluctuating, and dangerous sea, without a compass to steer our course, or a landmark to guide our way."—It is said, by our supreme court, that the obvious intention of all the legislation with respect to proceedings before justices of the peace is, to simplify the proceedings and dispense with all form and technicality consistent with a fair trial of the causes upon their merits. It is presumed, however, that the legislature did not intend to dispense with any of the substantial forms necessary to be observed in the progress of a suit, and only that the proceedings need not be drawn and conducted with the technical accuracy required in courts of record. Were it otherwise, it would be necessary, when suitors resort to these courts to obtain redress or satisfaction for injuries done to their persons or property, to consult the caprice and inclination of the justice rather than the rule of law. But it is not supposed that the legislature intended to authorize such a departure from the known and established rules; for in most of the proceedings before justices of the peace, the rules by which they are to be governed are marked out with considerable exactness and precision.

As yet, there is no treatise specially confined to the powers and duties of justices of the peace in this state; and many of the justices have not the means of acquiring such a knowlegde of their duties as to enable them to act with promptness and despatch.

The number of copies of the statute laws of this state which have been published is so small, that it is with much difficulty they can be obtained, and, in some counties, even the public offices are not supplied with them.

Many books have been published, both in England and in this country, which contain much valuable information; none of them, however, are practical guides for justices of the peace in this state, and but few of them would be willing to incur the expense of purchasing those books, and the statutes and the reports of the supreme court of this state, merely for obtaining the requisite information concerning their duties in the various branches of their jurisdiction. From these considerations, this work has been undertaken; and its object is, to furnish to justices of the peace a practical guide in most of the cases wherein they may be called to act. On account of the doubts and embarrassments which continually perplex and harass the greater number of justices of the peace while engaged in the discharge of their duties, the importance of any effort which may tend to render their path more plain and easy, will, undoubtedly, be appreciated. Any further apology seems to be superfluous; for every person in the least acquainted with judicial proceedings, is aware that accuracy, in every respect, cannot be attained in the practice of a court, so little of which has been settled by judicial decisions as that in the courts of justices of the peace in this state.

In considering the office and the powers and duties of justices of the peace,

First—Will be given, a brief account of the origin and office of justice of the peace in England;

Second—Will be considered their election and office in this state.

Their powers and duties will be more particularly noticed under the separate branches of their jurisdiction.

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JUSTICE OF THE PEACE.

PART I.

OF THE ORIGIN, ELECTION, AND OFFICE OF JUSTICE OF THE PEACE.

CHAPTER I.

OF THE ORIGIN AND OFFICE OF JUSTICES OF THE PEACE IN ENGLAND.

It is said that justices of the peace are so called because they be judges of record, and, withal, to put them in mind (by their name) that they do justice, which is, to yield to every man his own according to the laws, customs, and statutes, without respect of persons. *Dalt. Justice*, 7. They are appointed by the king for the conservation of the peace, and for the execution of divers things comprehended within their commission and within divers statutes committed to their charge. 3 *Burn's Justice*, 1. A court of record is that court which hath power to hold plea, according to the course of the common law, of real, personal, and mixed action, as the King's Bench, Com. Pleas, &c. 1 *Inst.* 117, 260. The Sheriff's Tourn is a court of record, and so is the Court Leet; it being the king's court, granted, by charter, to the lords of hundreds or manors. The oject of both of these courts is the preservation of the peace, and the chastisement of divers minute offences against the public good. 4 *Bl. Com.*, 273. All courts of record are the king's courts in right of his crown and royal dignity, and, therefore, no other court hath authority to fine or imprison; so that the very erection of a new jurisdiction with power of fine and imprisonment, makes it instantly a court of record. 3 *Bl. Com.*, 24. A court not of record is, where the proceedings are not according to the course of the common law, nor enrolled, as the county court, &c. 1 *Inst.*, 117. 2 *Roll. Abr.*, 574. A court not of record is the court of a private man, whom the law will not intrust with any discretionary power over the fortune or liberty of his fellow subjects. Such are the Courts Baron incident to every manor,

and other inferior jurisdictions where the proceedings are not enrolled or recorded; but as well the existence as the truth of the matter therein contained shall, if disputed, be tried and determined by a jury. 3 *Bl. Com.*, 25.

Justices of the peace are judges of record. (Yea, that every justice of the peace, by himself, is a judge of record, and one upon whose sole report and testimony the law reposeth itself very much, appeareth more plainly if you observe these things following:)

1. He is made under the great seal, which is a matter of record;

2. Every justice of the peace hath judicial power given unto him by the commission.

3. Also, by some *statutes* they have judicial power given them; for they may make a record of a force by them viewed, and may thereupon fine and imprison the offenders; yea, one justice of the peace, in some cases, may, also, hear and determine offences, and punish an offender as convict, upon his own view, or upon the confession of the offender, or upon the examination and proof of witnesses.

4. His warrant (though it be beyond his authority) is not disputable by the constable or other inferior minister, but must be obeyed and executed by them. But this must be understood when the justice of the peace hath jurisdiction of the cause for, or concerning, which he hath granted his warrant, for, otherwise, the constable, or other officer executing his warrant, seemeth to be punishable.

5. He may take a recognizance for the peace, &c., which is a matter of record, and which none can do but a judge of record.

6. His record, (or testimony,) in some cases, is of as great force as an indictment upon the oath of twelve men, and, in some other cases, of greater force than an indictment.

7. He, also, may make out process upon indictments or informations against offenders, &c., and that out of their sessions, (in some cases.) *Dalt. Justice*, 8.

A record or memorial, made by a justice of the peace, of things done before him judicially, in the execution of his office, shall be of such credit that it shall not be gainsaid. One man may affirm a thing, another may deny it, but if a *record* once say the word, no man shall be received to aver or speak against it, for if men should be admitted to deny the same, there would never be any end of controversies. And, therefore, to avoid all contention, while one saith one thing and another saith another thing, the law reposeth itself wholly and solely in the report of the judge. And hereof it cometh that he cannot make a substitute or a deputy in his office, seeing that he may not put over the confidence that is put in him. Great cause, therefore, have the justices to take heed that they abuse not this credit either to the oppression of the sub-

ject by making an untrue record, or defrauding of the king by suppressing the record that is true and lawful. 3 *Burn's Justice*, 1. Their orders being judicial acts, are only voidable, for they continue orders until avoided; but the authority given to justices of the peace ought to be exactly pursued, and so it ought to appear in their orders. *Dalt. Justice*, 9.

Of ancient times, such officers or ministers as were instituted either for the preservation of the peace of the county, or for execution of justice, because it concerned all the subjects of that county, and they had a great interest in the just and due exercise of their several places, were, by force of the king's writ, in every several county, chosen in full or open county by the freeholders of that county: as before the institution of justices of the peace, there were conservators of the peace in every county, whose office (according to their names) was to conserve the king's peace, and protect the obedient and innocent subjects from force and violence. These conservators, by the ancient common law, were, by force of the king's writ, chosen by the freeholders in the county court, out of the principal men of the county, after which election so made and returned, then, in that case, the king directed a writ to the party so elected to take upon him and execute the office until the king should order otherwise. 3 *Burn's Justice*, 2.

It is reported that William the Conqueror ordained justices of the peace about the year 1070; yet justices of the peace had not their being almost three hundred years after, viz., until 1327, at which time justices or commissioners of the peace were first created by Stat. of 1 Ed. 3, by which statute it was ordained in parliament that, for the better maintaining and keeping of the peace in every county, good men and lawful should be assigned to keep the peace. *Dalt. Justice*, 6. Under this statute, the election of conservators of the peace was taken from the people and given to the king; this assignment being construed to be by the king's commission. 1 *Bl. Com.*, 351. And yet the Stat. of 36. Eliz. is the first that nameth them justices of the peace. *Dalt. Justice*, 6.

The power, office, and duty of justices of the peace depend on their commissions and on the several statutes passed in the reign of Ed. 3, and many other statutes made since, which have created objects of their jurisdiction and greatly enlarged their authority. *Dalt. Justice*, 6. 1 *Bl. Com.*, 354. The commission first empowers a justice singly to conserve the peace, and thereby gives him all the powers of the ancient conservators of the peace. It also empowers any two or more to hear and determine all felonies and other offences, which is the ground of their jurisdiction at the sessions. 1 *Bl. Com.*, 354. This power was first given to them by the Stat. of 18. Ed. 3, and was afterwards confirmed and enlarged by divers statutes. 3 *Burn's Justice*, 19. And, in some cases, one justice of the peace may also hear and determine of-

fences, and punish an offender as convict, upon his own view, or upon confession, or upon examination and proof of witnesses. *Dalt. Justice*, 125.

And it will be observed that justices of the peace, out of their sessions, are now armed with far more ample authortiy and power than the ancient conservators of the peace were; for the justices of peace have double power given them, the one of jurisdiction to convene the offenders before them (by their warrant) and, in divers cases out of their sessions, to examine, hear, and determine the cause; the other of coercion (viz., after the cause heard,) to constrain them to the obedience and observance of their order and decree, which, notwithstanding, must be according to the rules of law and justice. Whereas the ancient conservators of the peace had no jurisdiction or authority at all, either to convene the offender before them, or to examine, hear, or determine the cause, but had only coercion or punishment of an offender in some few cases. *Dalt. Justice*, 24.

Whatsoever any one justice alone may do, (either for the keeping of the peace, or in other execution of the commission or statutes,) the same, also, may lawfully be done and performed by any two or more justices; but where the law giveth authority to two, there one alone cannot execute it. *Dalt. Justice*, 25. And yet, where a statute appointeth a thing to be done by two justices of the peace or more, if the offence be any misdemeanor or matter against the peace, there, upon complaint made of the offence to any of those justices of the peace, it seemeth that one of those justices may grant his warrant to attach the offender, and to bring him before the same justice and the other justice so appointed, (at some convenient place,) and then they to hear and determine the same. 3 *Burn's Justice*, 9. And it seems to be a general rule that, when a thing is appointed by any statute to be done by, or before, one person certain, that such thing cannot be done by, or before, any other; but that it ought to be done as the statute appointed, and by such express designation of one, or power given to one, all others are excluded. *Dalt. Justice*, 26. Where a statute requires any act to be done by two justices, it is, in general, an established rule that, if the act is of a judicial nature, or is the result of discretion, the two justices must be present to concur and join in it, otherwise it will be void. But where the act is ministerial, they may act separately, as in the allowance of a poor rate. This is the only act of two justices which has been construed to be ministerial, and the propriety of this construction has been justly questioned. 3 *Term. Rep.*, 380. It has, however, been held that an order of removel, signed by two justices separately, is not void, but voidable, and can only be avoided by an appeal to the sessions. 4 *Term. Rep.*, 596.

The commission of the peace, in itself, doth leave little or

nothing to the discretion of the justice of the peace, but doth limit them to proceed according to the customs, laws, and statutes; and, indeed, to leave too much to discretion, were to open a gap to corruption. And yet, all considerable circumstances can neither be comprehended in the commission, nor foreseen at the time of the making of the statutes; therefore, some things are referred to the consideration of the justices of the peace, and left to be supplied by them in their discretion. *Dalt. Justice*, 22.

Discretion is a knowledge or understanding to discern between truth and falsehood, between right and wrong, and not to do according to our wills and private affections; and, although authority may, in some instances, be given to justices of the peace to do according to their discretion, that yet their discretion ought to be limited and bounded with the rules of reason, law, and justice; and their proceedings must be according to the laws. Discretion is, to discern by the right line of the law and not by private opinion. *Dalt. Justice*, 23. When any thing is left to any person to be done according to his discretion, the law intends it must be done with sound discretion and according to law. *Jac. Law Dic., tit. Discretion.*

And no way better shall the discretion of a justice of the peace appear, than if he (remembering that he is *lex loquens*) shall contain himself within law, and shall not use his discretion but only where both the law permitteth and the present case requireth. *Dalt. Justice*, 24.

The power and authority of a justice of the peace is limited to be exercised only within the county where he is in commission; and he shall not deal in, or punish, any trespass, or any other like offence, committed in any other county against any penal statute, though such offender shall be brought before him, except the statute shall expressly enable him so to do. Neither shall any justice of the peace, for the time that he shall be out of the county where he is in commission, take any recognizance, or any examination, or otherwise to exercise his authority in any matter that shall happen within the county where he is in commission; neither can he cause one to be brought before him out of the county where he is in commission into the other county; for, being out of the county where he is in commission, he is but as a private man. *Dalt. Justice*, 25.

Although justices have no coercive power when out of the county; yet, it is said that recognizances and informations voluntarily taken before them, in any place, are good. And Lord Hale says, that a justice of the peace may do a ministerial act out of his county, as examining a party robbed whether he knows the felons; but that he cannot do a compulsory act, as committing a person for not giving recognizance. 3 *Burn's Justice*, 10.

Regularly, justices of the peace ought not to execute their office in their own case, but cause the offender to be convey-

ed or carried before some other justice, or desire the aid of some other justice being present. 3 *Burn's Justice.* The mayor of Hereford was laid by the heels for setting in judgment in a cause where he himself was lessor of the plaintiff in ejectment, though he, by the charter, was sole judge of the court. 1 *Salk. Rep.*, 396. By which, it is presumed, is to be understood that he was removed from office.

An order of removal of a poor person from Great Chart to Kennington was quashed, because one of the justices who made the order was an inhabitant of Great Chart at the time, and charged to the poor rate there. And, by the court: no rule of law or reason is more established than that a judge ought to stand disinterested. *Burn's Justice*, 25.

Yet, in some cases, if the justice should act in his own cause, it seemeth to be justifiable; as, when a justice shall be assaulted, or (in doing his office, especially) shall be abused to his face, and no other justice present with him, then it seems, he may commit such offender until he shall find sureties of the peace or good behavior, as the case shall require. But, if any other justice be present, it were fitting to desire his aid. 3 *Burn's Justice*, 25. Neither should justices of the peace, in any part of their office, meddle (if they can avoid it) where any relation is concerned, for it brings a suspicion upon their proceedings; but, if they must needs meddle, as it is not always in their choice, that they carry themselves uprightly herein. For one Carew (a justice of the peace of Devon) was censured, he going to view a riot, and the rioters being escaped before his coming, he refused to go to the place where they were, although but a little way off, and the peace being required against them, he took recognizances to keep the peace against others that demanded it not, and granted *supersedeas*, and procured the peace to be released the next day; and all this in favor of his brother. *Dalt. Justice*, 590.

There was an order of two justices for the removal of a poor person from the parish of Pancras to Rumbald, within three days, the justices reciting that they were surprised, *superseded* it, and commanded the church-wardens to return the former order to be cancelled. It was insisted that the justices could not issue a *supersedeas*. But, by the court: the *supersedeas* is well sent by the justices, and to prevent the charge of an appeal. And the last order was confirmed. 3 *Burn's Justice*, 26. And the same justice of the peace, after surety for the peace taken, may make the party a *supersedeas* to discharge him from any other arrest, or deliver him, being in prison for the peace, at any other man's suit. *Cromp.*, 237. But Mr. Lambert thinketh it not in the power of any one justice of the peace to grant such *supersedeas* at this day, but that it must be done by two justices at the least. Mr. Dalton says, nevertheless, for that I find the old precedents to run in the name of one justice of the peace alone, I have

drawn mine accordingly. He also says, that a *supersedeas* to a capias upon an indictment for a trespass or a transgression (and so of an exigent) may be granted by the justice of the peace out of sessions; for, otherwise, it were mischievous for the party, as well by reason of his imprisonment, as, also, for that he may be outlawed before the sessions, if the justice of the peace might not take sureties of him for his appearance, and all is but to appear to answer the indictment. *Dalt. Justice*, 611. 1 *Chitty, Crim. Law*, 46.

If a justice exceed his authority in granting a warrant, yet the officer must execute it; but if it be a case wherein he hath no jurisdiction, or in a matter whereof he hath no cognizance, the officer ought not to execute such warrant; so that the officer is bound to take notice of the authority and jurisdiction of the justice. *Cro. Car.*, 394. 1 *Co.*, 76. Thus, if a justice send a warrant to a constable to take up one for slander, or the like, the justice hath no jurisdiction in such cases, and the constable ought to refuse the execution of it. 3 *Burn's Justice*, 26.

A writ of *mandamus* issues to the judges of any inferior court, requiring them to do justice according to the powers of their office whenever the same is delayed, for it is the peculiar business of the court of King's Bench to superintend all inferior tribunals and therein to enforce the due exercise of those judicial and ministerial powers with which the crown or legislature have invested them, and this not only by restraining their excesses, but, also, by quickening their negligence and obviating their denial of justice. 3 *Bl. Com.*, 110. Upon information exhibited by the officers of customs upon a seizure of brandy, wherein justices of the peace may make their determination, the fact appeared not to warrant the seizure, but the justice, in favor of the officer, refused to dismiss the information, so as the owners might have their brandy again. A *mandamus* was moved for to compel him to determine the matter, which was granted accordingly. *Str. Rep.*, 530. And, by statute, it is provided that two justices may summon any person to take the oaths before them, and, if they do not appear, then, on oath of serving such summons, the justices are to certify the same to the quarter sessions, where, if the party so summoned do not appear to take the oaths, he shall stand convicted of recusancy. The defendants were justices of the peace and issued their summons according to the statute, but coming afterwards to understand that the party was a gentleman of fashion and not suspected to be against the government, lest a transaction of this nature should be an imputation upon him, they refused to give the prosecutor his oath of the service of such summons, that the matter might go no further. And now, upon motion against them for an information, the court declared, that the justices had no discretionary power

to refuse to put the act in execution, and, therefore, granted an information against them. *Str. Rep.*, 413.

In summary convictions, the party ought to be heard, and, for that purpose, ought to be summoned in fact; and, if the justice proceed against a person without summoning him, it would be a misdemeanor in him, for which an information would lie. 1 *Burn's Justice*, 413.

A justice of the peace is strongly protected by the law in the just execution of his office.

And it is said that a judge is not answerable, either to the king or the party, for the mistakes or errors of his judgment in a matter of which he has jurisdiction; for it would expose the justice of the nation, and no man would execute the office upon peril of being arraigned by action or indictment for every judgment he pronounces. 1 *Salk. Rep.*, 396. In the case of Miller *v.* Seare, 2 *Bl. Rep.* 1141, De Gray, Ch. J., says, It is agreed that the judges in the king's superior courts of justice are not liable to answer personally for their errors in judgment. In courts of special and limited jurisdiction, having power to hear and determine, a distinction must be made. While acting within the line of their authority, they are protected as to errors in judgment, otherwise they are not protected.

A justice of the peace is not punishable at the suit of the party, but only at the suit of the king, for what he doth as judge in matters which he hath power by law to hear and determine without the concurrence of any other; for, regularly, no man is liable to an action for what he doth as judge. But, in cases wherein he proceeds ministerially rather than judicially, if he acts corruptly, he is liable to an action at the suit of the party, as well as to an information at the suit of the king. 3 *Burn's Justice*, 30.

In the case of the King against Young and Pitts, Esquires, justices of the peace for Wiltshire, which was upon an information moved for against the justices for arbitrarily and unreasonably refusing to grant an alehouse license, Lord Mansfield, Ch. J., declared, that the court of king's bench hath no power or claim to review the reasons of justices of the peace upon which they form their judgments in granting licenses, by way of appeal from their judgment, or overruling the discretion in that behalf intrusted to them. But, if it clearly appears that the justices have been partially, maliciously, or corruptly influenced in the exercise of this discretion, and have (consequently) abused the trust reposed in them, they are liable to prosecution by indictment or information, or, even, possibly, by action, if the malice be very gross and injurious. If their judgment is wrong yet their heart and intention pure, God forbid that they should be punished. And he declared that he should always lean towards favoring them, unless partiality, corruption, or malice shall clearly appear. Mr. Justice

Denison, also, expressly allowed the discretionary power of justices in granting licenses, without appeal from their judgments or having their just and honest reasons reviewed by any body. But, yet, an improper and unjust exercise of their discretion, he said, ought to be under control. But it must be a clear and apparent partiality or wilful misbehavior to induce the court to grant an information, not a mere error in judgment. Mr. Justice Foster concurred in the same general principles; and Mr. Justice Wilmot was, also, very explicit, that the sole discretion of granting licenses is in the justices of the division; which being so, the rule is invariable, that this court will never interpose to punish a justice of the peace for a mere error in judgment. Therefore, even supposing the justices in the present case to have been mistaken from beginning to end; yet, there is no ground, from any of the affidavits, to infer any partiality, malice, or corruption. And the court being unanimously of opinion that the justices had acted in this affair with candor and impartiality, discharged the rule to show cause, with costs. 3 *Burn's Justice*, 31. In 12 *Co.*, 25, is stated the case of one Nudigate, who was a justice of the peace and had recorded a force upon view, which he did as judge of record, and a bill was exhibited against him for this, that he had falsely made a record when, indeed, there was not any force; and, by the opinions of Catlin and Dyer, justices, it was resolved, "that that thing that a judge doth as judge of record, ought not to be drawn in question."

And a justice of the peace is not to be slandered or abused, as appears by the case of Aston *v.* Blagrave. *Str. Rep.* 617. The plaintiff declared that he was a justice of the peace, and that, upon a *colloquium* of him and the execution of his office, the defendent said, you are a rascal, a villain, and a liar. After verdict for the plaintiff, it was moved, in arrest of judgment, that these words are not *actionable*. It was urged for the plaintiff, There is a great difference between magistrates and common tradesmen: words of the latter must affect them in their particular way of dealing; but any thing that tends to impeach the credit of the former, is actionable. And, although an indictment might not lie for these words, as, perhaps, not tending to a breach of the peace; yet, nevertheless, they are actionable, for, in, many cases, words are actionable which are not indictable. After consideration, Pratt, Ch. J., delivered the opinion of the court: that, though *rascal* and *villain* were uncertain, yet, being joined with *liar*, and spoken of a justice of the peace, they did import a charge of acting corruptly and partially, and, therefore, there ought to be judgment for the plaintiff.

In the case of Kent *v.* Pocock, *Str. Rep.*, 1168, these words spoken of a justice of the peace in the execution of his

office and relating thereto, viz., *Mr. Kent is a rogue*, were held actionable.

In the case of the King *v.* Revel, *Str. Rep.*, 420, the defendant was indicted for saying of Sir Edward Lawrence, a justice of the peace in the execution of his office, *You are a rogue and a liar*. It was moved, after verdict for the king, in arrest of judgment, that, though the justice might have committed him for the contempt, yet the words were not indictable, since it is not presumed they would provoke the justice to a breach of the peace, which is the reason why indictments have been held to lie for words. But, by the court: the allowing he might be committed, shows they were indictable. It is true, the justice may make himself judge and punish him immediately; but still, if he thinks proper to proceed less summarily, by way of indictment, he may. The true distinction is, that, where words are spoken in the presence of the justice, there he may commit; but where it is behind his back, the party can be only indicted for a breach of the peace. Judgment for the king.

In the case of the King *v.* Pocock, *Str. Rep.* 1157, an information was moved for against the defendant, on account of words spoken of Mr. Kent, a justice of the peace, and the affidavit stated that, in a conversation about a warrant granted by Mr. Kent, the defendant asked if Mr. Kent was a sworn justice, and, being answered, to be sure he was, else he would not act, the defendant replied, If he is a sworn justice, he is a rogue and a foresworn rogue. To this it was objected, that the words were not spoken to him in the execution of his office, but only in relation to what he had formerly done; and, by the court: there ought to be no information: it is not the same insult and contempt as if spoken to him in the execution of his office, which would make it a matter indictable. Although an information or indictment might not lie in the last case, yet, it doth not follow but that the words were actionable; and so it seemeth to have been held in the case of Kent *v.* Pocock above mentioned, which appears to have been no other than an action brought for this very same offence, after it had been determined that an information would not lie. 3 *Burn's Justice*, 30.

If a justice will not, on complaint to him made, execute his office, or shall misbehave in his office, the party grieved may move the court of King's Bench for an information, and, afterwards, may apply to the court of chancery to put him out of the commission. 2 *Atk.*, 2.

In the case of the king *v.* Symonds, an information was moved for against the defendant for assaulting and beating the mayor of Yarmouth, being a justice of the peace in the execution of his office. On showing cause, the question was, whether the defendant could justify, the mayor having struck him first. By Lord Hardwick, Ch. J., He may justify it,

for, though a magistrate is protected by the law whilst he is in the execution of his office; yet, in this instance, he hath forfeited that protection by beginning a breach of the peace himself. 3 *Burn's Justice*, 34.

CHAPTER II.

OF THE ELECTION AND OFFICE OF JUSTICE OF THE PEACE IN THIS STATE.

By the ordinance for the government of the territory of the United States north-west of the Ohio river, it is provided that, "previous to the organization of the general assembly, the governor shall appoint such magistrates and other civil officers in each county or township as he shall find necessary for the preservation of the peace and good order in the same. After the general assembly shall be organized, the powers and duties of magistrates, and other civil officers, shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor."

During the period of the territorial government, the magistrates exercised such powers as they were invested with by the common law and the laws for the government of the territory.

By Art. IV., Sec. 8, of the constitution of this state, it is declared that "a competent number of justices of the peace shall be appointed in each county in such manner as the general assembly may direct, whose time of service, power, and duties shall be regulated and defined by law; and justices of the peace, when so appointed, shall be commissioned by the governor."

By the first section of the act of Feb. 19, 1819, it is enacted "that the house of representatives shall nominate to the senate a competent number of persons in each county to be appointed justices of the peace, and, if the nomination shall be confirmed by the senate, the governor shall commission the persons so nominated and confirmed, during good behavior: *Provided*, however, that, hereafter, when the general assembly shall not be in session and any vacancies shall happen, by death, resignation, or otherwise, or when an additional number of justices shall be required in any county, it shall be

the duty of the county commissioners, in their respective counties, to nominate fit persons to fill such vacancies, and to report such additional number to the governor, who shall, thereupon, issue commissions to the person or persons so nominated, and that persons so appointed shall hold their office until the end of the next general assembly."

By the second sec. of the act of Dec. 30, 1826, it is enacted, that "it shall be the duty of the courts of county commissioners of each county in this state, at their next June term, to divide their respective counties into a convenient number of districts, not less than two nor more than eight, distinctly defining the boundaries of each district, giving to each a name, to appoint a place therein for holding the elections hereinafter mentioned, and to cause the same to be entered of record in their respective courts. Should any of said courts fail or neglect to lay off their county into districts as aforesaid, at their said June term, it shall be their duty to call a special term of the court for that purpose, and to proceed to lay off their county into districts in all respects as aforesaid. It shall be the duty of the clerks of said courts respectively to make out, forthwith, as many copies of said records as there shall be districts in his county, and to deliver the same to the sheriff, whose duty it shall be, within ten days after the close of the term of the court at which the county shall be so divided into districts, to post up, at the place appointed for holding elections in each of said districts, one of said copies." *Gale's Stat.*, 399.

"Sec. 3. The said courts shall, respectively, at their said June term, and at their June term every fourth year thereafter, appoint three electors in each of said districts to be judges of election therein; and should any of said courts, at any such term, fail to appoint judges of election, it shall be their duty to call a court for that purpose: and judges of election who shall be appointed as aforesaid shall continue in office for four years, and until their successors shall be appointed. When a vacancy shall happen in the office of judge of election, or when any such judge shall fail to attend, or refuse to serve, the vacancy shall be filled, or the judge appointed, in the manner prescribed in like cases by the general election law. The said judges, and all other judges to be appointed by this act, shall give the notice of election, be qualified, appoint clerks, who shall be qualified; and the elections hereinafter mentioned shall be conducted, returns thereof made, opened, examined, abstracts thereof made and transmitted to the office of secretary of state, in the manner prescribed by law for the election of sheriff; and the said judges of election shall be notified of their appointment in the manner prescribed for notifying other judges of election; *Provided*, That nothing in this act shall be so construed as to give the judges of the election or clerks any compensation for their services."

"Sec. 4. An election shall be held in each of said districts, on the first Monday in August next, and on the first Monday in August every fourth year thereafter, for two justices of the peace in each of said districts, except the district in which the county seat shall be, in which district there shall be three justices of the peace elected; and the justices so elected, shall continue in office for the term of four years, and until their sucsessors shall be elected and qualified to office, respectively; at which election the inhabitants of a district qualified to vote at the general election, shall be entitled to vote. The persons receiving the highest number of votes in a district, shall be declared duly elected." *Gale's Stat.*, 400.

By the seventh sec. of the act of Jan. 13, 1829, it is enacted, that "It shall be lawful for the county commissioners' court, of any county of this state, when they may deem it necessary, to cause an election to be held of one additional justice of the peace, and two additional constables, in the district which includes the county seat; such justices of the peace and constables to hold their offices until the next quadrennial election of justices of the peace and constables, at which time an election shall take place in such district for four justices of the peace and four constables; and all vacancies in the office of constable shall be filled by appointments made by the county commissioners' court: *Provided*, that a majority of the qualified voters of the district may petition the county commissioners court for that purpose." *Gale's Stat.*, 418.

By the fifth sec. of the act of Dec. 30, 1826, it is enacted that, "When a vacancy shall happed in the office of justice of the peace in a district under this act, it shall be the duty of the clerk of the county commissioners' court of the county in which the vacancy shall so happen, to issue his order to the judges of election in the district, requiring them on a certain day, not less than twenty days from the date of such order, to hold an election to fill such vacancy; and the said judges shall, at the time appointed in said order, hold an election to fill such vacancy, and conduct the same, and make returns thereof, which shall be opened, examined, abstracts thereof made and transmitted to the secretary's office, in the manner directed in the fourth section." *Gale's Stat.*, 400.

"Sec. 6. When a new county shall hereafter be created it shall be the duty of the court of county commissioners thereof, at their first term, to divide the same into districts as aforesaid, and appoint judges of election, and a time and place for holding elections therein as aforesaid, and to cause the same to be entered of record; and if, from any cause, the said court shall fail or neglect the duty aforesaid, at their said first term, it shall be their duty to hold a special term for that purpose; and the clerk shall make out copies of such record, and the sheriff shall post up the same, as is provided in the second section of this act; and elections shall be held therein,

for justices of the peace, returns thereof made, examined, and transmitted, in all respects as provided in the fourth section of this act; and justices of the peace so elected, shall continue in office until the next quadrennial election of justices of the peace, and until their successors shall be elected and qualified." *Gale's Stat.*, 401.

By the first sec. of the act of Jan. 13, 1829, it is enacted "That it shall be lawful for the county commissioners' court in the counties in this state, at any regular or special term, to lay off in their several counties as many districts, not exceeding eight, for the election of justices of the peace and constables, as they shall deem necessary and proper." *Gale's Stat.*, 417.

"Sec. 2. When any district shall be so laid off, elections for justices of the peace and constables shall be held therein, in the same manner as is prescribed in the act to which this is a supplement; and the justices and constables elected in said districts shall continue in office until the next quadrennial election of justices of the peace and constables, and until their successors shall be elected and qualified.

"Sec. 3. When a vacancy shall happen in any district created in pursuance of this act, the same shall be filled in the manner prescribed in the fifth section of the act to which this is a supplement.

"Sec. 4. The county commissioners' court, at any regular term, shall have power to alter the limits of the several districts in their respective counties, as the convenience of the county may require: *Provided*, no such alteration shall be made without petition from a majority of the qualified voters residing within the limits of the district proposed to be altered, and twenty days' public notice given of their intention to petition for such alteration.

"Sec. 5. No alteration which shall be made in the districts shall prevent the justices of the peace or constables, in office at the time of such alteration, from serving out the time for which they may have been elected."

By the first sec. of the act of Jan. 7, 1835, it is enacted "That the county commissioners' court of the several counties of this state, be, and they are hereby authorized to increase the number of districts for the election of justices of the peace in their respective counties whenever they may deem the interest of the people require the same." *Gale's Stat.*, 426.

"Sec. 2. The justices elected in said districts, shall be elected in the manner, and be subject to the provisions contained in the act to which this is an amendment.

"Sec. 3. That so much of the act, to which this is an amendment, as limits the number of justices' districts to eight in each county, be, and the same is hereby repealed."

The power and authority of justices of the peace are limited,

and can only be exercised within the county for which they are elected and are in commission. *Dalt. Justice*, 24. Although elected in particular districts, they have a concurrent jurisdiction in all parts of the county. 2 *Burn's Justice*, 13.

By the ninth sec. of the act of Dec. 30, 1826, it is enacted that "Justices of the peace, who shall be elected under the authority of this act, shall have jurisdiction in their respective counties, and shall be commissioned by the governor, and sworn into office, as now required by law." *Gale's Stat.*, 401.

By the first sec. of the act of Jan. 7, 1831, it is enacted "That no act of the present general assembly, nor any act which may hereafter be passed, forming a new county, or altering the boundaries of a county, shall be construed to affect in any manner the tenure of office of any justice of the peace or constable, but they may remain in office and continue to act as such in the new county, or county to which they may be transferred, for and during the term of time for which they were severally elected, commissioned, &c., as if no such alteration had taken place." *Gale's Stat.*, 422.

By the first sec. of the act of March 1, 1833, *Gale's Stat.*, 422, it is enacted "That every justice of the peace elected after the first day of July, one thousand eight hundred and thirty-five, before he shall enter upon the duties of his office, shall execute and deliver to the clerk of the county commissioners' court, of the proper county, within twenty days after his said election, a bond, to be approved by said clerk, with one or more good and sufficient securities, in the sum of not less than five hundred nor more than one thousand dollars; conditioned that he will justly and fairly account for and pay over all moneys that may come to his hands under any judgment, or otherwise, by virtue of his said office: and that he will well and truly perform all and every act and duty enjoined on him by the laws of this state, to the best of his skill and abilities. Said bond shall be made payable to the county commissioners of the county in which such justice of the peace shall be elected, and their successors in office, for the use of the people of the state of Illinois, and shall be held for the security and benefit of all suitors and others, who may be injured or aggrieved by the official acts or misconduct of such justice of the peace, which said bond shall remain in force for the term of five years after the expiration of his term of office.

"Sec. 2. If any justice of the peace elected as aforesaid shall not, within twenty days after his election, give bond as aforesaid, said office shall be considered as vacant, and shall be filled accordingly.

"Sec. 3. Any person aggrieved by the failure of any justice of the peace to fulfil and comply with the condition of his said bond, may prosecute the said justice of the peace

and his securities thereupon, in the same manner that sheriffs are proceeded against, on their bonds.

"Sec. 4. It shall be the duty of the clerks of the county commissioners' courts of the several counties in this state, upon the execution and filing bond as aforesaid, by any justice of the peace, to make out a certificate of the execution and filing thereof, under the seal of his office, and transmit the same to the governor of this state, who shall thereupon issue a commission to said justice of the peace.

"Sec. 5. Justices of the peace, who shall have given bond and received commissions under the provisions of this act, are authorized and empowered, and it is hereby made their duty, to receive money on all notes and demands which may have been placed in their hands for suit or collection, and also upon all judgments rendered by them prior to the issuing executions thereon; and upon the failure of such justice, after demand made, to pay over any money, by him collected or received as aforesaid, to any person entitled to receive the same, his, or her agent or attorney, such person may proceed against such justice in a summary way, either before a circuit court, or some other justice of the peace of the county in which such first mentioned justice may reside, by motion, upon giving to such justice five days' notice of the application, and recover the amount so neglected or refused to be paid, with twenty per cent. damages thereon, for such detention, and shall have execution therefor: *Provided*, That in all such cases, if the said justice shall pay or satisfy the amount claimed by the party prosecuting, with costs, under the direction of the court or justice, before final judgment, all further proceedings therein shall be stayed."

By the statute of this state, justices of the peace are declared to be conservators of the peace. They are, also, charged with the execution of many statutes, by some of which they are constituted judges, and may examine, hear, and determine; as in cases of assault and battery, and forcible entry and detainer, &c.

And a very important and extensive jurisdiction has been conferred upon them, unknown to justices of the peace in England; that is, to hold plea, and to hear and determine in a number of civil actions, and in actions for the recovery of penalties given by the statute. And this is for the ease of the people, and that they may have justice done them near at home, without being delayed and put to the charge and loss of time which necessarily attend a resort to the circuit courts.

The powers and duties of justices of the peace, under each of these three branches of jurisdiction, will be separately and more particularly noticed in the following parts of this treatise.

By the fifty-sixth sec. of the act of Feb. 3, 1827, "The justices of the peace within this state shall have power to admin-

ister all oaths required by law, and not particularly directed to be otherwise administered; and where any person, who shall be required by law to take an oath, shall be conscientiously scrupulous against taking such oath in the usual form, such person may affirm; which affirmation shall have the force and effect of an oath." *Gale's Stat.*, 414.

Where proceedings are authorized to be had before a justice of the peace under any statute, against any person, it is necessary that the justice should notify such person of the proceedings against him, whether such notice is expressly required by the statute or not. It would be a violation of one of the first principles of justice and of judicial proceedings, to try and decide upon the rights of an individual, either civilly or criminally, without notice, and, consequently, without affording him an opportunity of defending himself. 1 *Scam. Rep.*, 515.

In summary convictions, the party ought to be heard, and, for that purpose, ought to be summoned in fact; and, if the justice proceed against a person without summoning him, it would be a misdemeanor in him for which an information would lie. 1 *Salk. Rep.*, 181. *Str.*, 678.

By the fifty-first sec. of the act of Feb. 3, 1827, "Any justice of the peace may appoint a suitable person to act as constable in a criminal or other case, where there is a probability that a person charged with any indictable offence will escape, or that goods and chattels will be removed, before application can be made to a qualified constable; and the person so appointed, shall act as constable in that particular case, and no other; and any temporary appointments so made as aforesaid, shall be made by a written endorsement, under the seal of the justice deputing, on the back of the process, which the person receiving the same shall be deputed to execute." *Gale's Stat.*, 412.

The appointment of a constable *pro tem.*, by a justice of the peace, to execute process under this statute, must be made by endorsement upon the back of the process; and this endorsement may be regarded as the commission of the special constable, without which his execution of the process entrusted to him would be illegal and void. An appointment upon a separate and distinct paper is not in compliance with the statute. The statute specifies but two cases in which a justice is authorized to appoint a constable *pro tem.*; the one is, to execute criminal process, where the accused is likely to escape; and the other is, to execute civil process, where the goods and chattels are about to be removed before application can be made to a qualified constable; and, in the latter case, as a *prerequisite* to the power of appointment, it must be shown that the goods and chattels are about to be removed. It is, also, manifest, that the process contemplated by the statute and which the justice is authorized to depute an

individual to execute, is not a summons to the individual, or other personal notice, but it is an execution or an attachment against the personal property about to be removed, in order to secure to a creditor the means of satisfying his demand. 1 *Scam. Rep.*, 488.

By the fiftieth sec. of the act of Feb. 3, 1827, "If any justice of the peace, or constable, shall fail, refuse, or neglect to perform any duty appertaining to his office, when required, or shall refuse to act as such justice or constable, when required, he shall be deemed guilty of a palpable omission of duty, and, on conviction, shall be punished accordingly." *Gale's Stat.*, 412.

By sec. 110 of the criminal code, "Every justice of the peace, constable, &c., who shall be guilty of any palpable omission of duty, or who shall wilfully and corruptly be guilty of oppression, malfeasance, or partiality in the discharge of his official duties, shall, upon conviction thereof, be fined in a sum not exceeding two hundred dollars; and the court shall have power, upon the recommendation of the jury, to add to the judgment of the court, that any officer so convicted shall be removed from office."

Under this statute, James L. Wickersham, Esq., was indicted, and the indictment charged that he took up certain estray animals, specifying the number and kind, and corruptly caused them to be appraised before himself, a justice of the peace. A jury trial was had, and verdict of guilty, upon which judgment of fine and removal from office was rendered, upon the recommendation of the jury. On motion for a new trial, one of the errors assigned was, that the indictment contained no indictable offence. On this point Mr. Justice Smith, in delivering the opinion of the court, says, "We are to enquire whether an act of an official character, done by a justice of the peace, with a corrupt intent, is an indictable offence, and whether the indictment charged the commission of such an act with such an intent. By the 110th section of the act relative to criminal jurisprudence, passed in 1833, it is expressly provided, that justices of the peace may, for corrupt acts of oppression, partiality, or malfeasance in office, be indicted, and, upon conviction, they shall be fined and removed from office upon the recommendation of the jury. From the provision of the act, it cannot be doubted that acts of misconduct by justices of the peace, done with corrupt motives, are indictable offences."—Again, he says, "The indictment is substantially good, although it might have been more formal and particular in setting out, specifically, each illegal and corrupt act embraced in the general allegation of causing the animals to be corruptly appraised before himself." 1 *Scam. Rep.*, 128.

In the case of Jones, plaintiff in error, *v.* the People, an indictment was found against Jones as a justice of the peace,

for refusing to issue a subpœna at the request of John King, who was arrested and brought before him on a charge of perjury. The indictment charged that the said Jones, justice of the peace, as aforesaid, refused to issue subpœnas for and on behalf of the said John King, and immediately forced the said John King into a trial, (an examination,) and adjudged him guilty of said offence, and required him to enter into a recognizance for his appearance, &c. The indictment averred that, in so refusing to issue subpœnas at the request of said John King, the said Jones was guilty of malfeasance in office, &c. The defendant moved the court to quash the indictment. The motion was overruled, and the defendant was found guilty. On error to the supreme court, Mr. Justice Brown, delivering the opinion of the court, says, "The indictment attempted to charge Jones with malfeasance in office. To make this indictment good, it ought to have charged that the defendant wilfully and corruptly refused to issue subpœnas. The offence is not set out in the indictment in the terms of the statute, nor in such a way as it can be understood. The court erred in overrulling the motion to quash the indictment." Judgment reversed and the cause remanded. 2 *Scam. Rep.*, 477.

Where a justice has jurisdiction, but proceeds erroneously, he is not a trespasser; but where he has not jurisdiction, he is. If magistrates were always held liable for every trivial mistake they commit in the performance of their various duties, few persons would be found willing to accept an office of so little profit and attended with such great risk. *Breese's Rep.*, 144.

If a magistrate officiously and without any complaint on oath, or of his own knowledge, issue his warrant to apprehend a person, he will be liable in an action of trespass. *Breese's Rep.*, 165. And a warrant for a felony, founded upon an affidavit which stated "That A. B. entered the enclosure of C. D. and carried off her grain," is no justification to the justice who issued the warrant, as the affidavit contains no words importing a felony. The justice had no jurisdiction, and this is apparent both from the affidavit and *warrant*, and the officer who acts under such process cannot thereby claim to be justified. *Breese's Rep.*, 18.

When a justice acts without acquiring jurisdiction, he is a trespasser; but having once acquired jurisdiction, an error in judgment does not subject him to an action. He is entitled to the protection afforded to a judge of a court of record. 17 *Johns. Rep.*, 145.

In the case of Mather *v.* Hood, 8 *Johns. Rep.*, 36, it was held, by the supreme court of New York, that a justice was justified while acting within his jurisdiction under the statute to prevent forcible entries and detainers. They say that the decisions are uniform that the record is not traversable, because the justice, in making it, acts not as a minister but as a

judge; and, according to settled principles of law, a record of such proceedings which is regular and correct upon the face of it, cannot be questioned or traversed in a collateral action. It is a full and complete bar to any suit against the magistrate.

The jurisdiction of a justice of the peace, it seems, is not questionable in suit before him, on the ground that he is not qualified to hold the office, when he is in office by color of right and exercising the duties thereof. *Breese's Rep.*, 68.

The acts of officers *de facto* are often valid as far as they concern the public and the rights of third persons. 9 *Johns. Rep.*, 135. An officer *de facto* is one coming into office by color of election, and all his acts are good until removed; and such officer can only be removed by information in the nature of a *quo warranto; Breese's Rep.*, 68. 7 *Johns. Rep.*, 550; or by proceeding under the statute authorising his removal.

By the seventh sec. of the act of March 1, 1833, "No justice of the peace shall be permitted to appear as counsellor for either party, on the trial of any appeal from any judgment which he may have rendered." *Gale's Stat.*, 424.

By the tenth sec. of the act of Dec. 30, 1826, "Any clerk, sheriff, justice of the peace, judge of the election, or other person, who shall fail, neglect, or refuse to perform any of the duties enjoined by this act, relative to elections or the delivery of statutes, dockets, books, or papers, shall, for any such failure, neglect, or omission, forfeit and pay for the use of the county, to be recovered by action of debt, in the name of the county commissioners, in any court having jurisdiction thereof, if a judge of the election, clerk, or sheriff, the sum of ten dollars; and if a justice of the peace, the sum of one hundred dollars." *Gale's Stat.*, 401.

By the sixth sec. of the act of Jan. 13, 1829, "When any justice of the peace shall resign his office, or remove from the county or district in which he was elected, it shall be his duty to deliver over his docket, and papers relating to the business transacted before him, to the nearest justice of the peace of his county, and to return to the office of the clerk of the county commissioners' court all copies of the statutes which he may have received from that office; and in case of the death of any justice of the peace, it shall be the duty of the person having possession of said docket, papers, and statutes, to deliver them over as aforesaid. And any person, who shall refuse or neglect to comply with the requisition of this section, shall forfeit and pay a sum not exceeding fifty dollars, to the use of any person who may sue for the same in any court having cognizance thereof." *Gale's Stat.*, 418.

PART II.

OF PROCEEDINGS IN CRIMINAL CASES BEFORE JUSTICES OF THE PEACE.

By the 1st sec. of "An act to regulate the apprehension of offenders and for other purposes," it is provided "That the judges of the supreme court throughout the state, the judges of the circuit courts in their respective circuits, and justices of the peace in their respective counties, shall jointly and severally be conservators of the peace, within their respective jurisdictions, as herein designated, and shall have full power to enforce, or cause to be enforced, all laws that now exist, or that shall hereafter be made, for the prevention and punishment of offences, or for the preservation and observance of the peace. They shall have power to cause to be brought before them, or any of them, all persons who shall break the peace, and commit them to jail, or admit them to bail, as the case may require, and to cause to come before them, or any of them, all persons who shall threaten to break the peace, or shall use threats against any person within this state, concerning his or her body, or threaten to injure his or her property, or the property of any person whatever; and also all such persons as are not of good fame, and the said judge or justice of the peace, being satisfied, by the oath of one or more witnesses, of his or her bad character, or that he or she had used threats, as aforesaid, shall cause such person or persons to give good security for the peace, or for their good behavior towards all the people of this state, and particularly towards the individual threatened. If any person against whom such proceedings are had, shall fail to give a recognizance with sufficient security, it shall be the duty of the judge or justice of the peace before whom he or she shall be brought, to commit such person or persons to the jail of the proper county, until such security be given, or until the next term of the circuit court. Such judge or justice of the peace, shall also take recognizances for the appearance of all witnesses at such courts. All recognizances to be taken in pursuance of this section, shall be returnable at the next circuit court, to be holden in the proper county, where all such recognizances shall be renewed or dismissed, as the said circuit court shall, upon the examination of the witnesses, deem to be just and right. And where the person or persons committed are in jail at the sitting of such circuit court, the court shall examine the witnesses, and either continue the imprisonment, bail the

prisoner, or discharge him or her, as to the said court shall appear to be right, having due regard to the safety of the citizens of this state." *Gale's Stat.*, 237.

CHAPTER I.

OF PERSONS CAPABLE OF COMMITTING CRIMES, OF ACCESSORIES, AND WHO MAY BE WITNESSES IN CRIMINAL CASES.

Persons capable of committing crimes.

CRIMINAL Code. "SEC. 1. A crime or misdemeanor consists in a violation of a public law, in the commission of which there shall be an union or joint operation of act and intention, or criminal negligence.

"SEC. 2. Intention is manifested by the circumstances connected with the perpetration of the offence, and the sound mind, and discretion of the person accused.

"SEC. 3. A person shall be considered of sound mind who is neither an idiot or lunatic, or affected with insanity; and who hath arrived at the age of fourteen years, or before that age, if such person know the distinction between good and evil.

"SEC. 4. An infant under the age of ten years, shall not be found guilty of any crime or misdemeanor.

"SEC. 5. A lunatic or insane person, without lucid intervals, shall not be found guilty of any crime or misdemeanor, with which he may be charged; *Provided*, the act so charged as criminal, shall have been committed in the condition of insanity.

"SEC. 6. An idiot shall not be found guilty, or punished, for any crime or misdemeanor, with which he or she may be charged.

"SEC. 7. Any person counselling, advising, or encouraging an infant under the age of ten years, lunatic, or idiot, to commit any offence, shall be prosecuted for such offence when committed, as principal, and if found guilty, shall suffer the same punishment that would have been inflicted on such person counselling, advising, or encouraging, as aforesaid, had he or she committed the offence directly, without the intervention of such infant, lunatic, or idiot.

"SEC. 8. A married woman acting under the threats, command, or coercion of her husband, shall not be found guilty of

any crime or misdemeanor not punishable with death, *Provided* it appear from all the facts and circumstances of the case, that violent threats, command, or coercion were used; and in such case the husband shall be prosecuted as principal, and receive the punishment which would otherwise have been inflicted on the wife, if she had been found guilty.

"Sec. 9. Drunkenness shall not be an excuse for any crime or misdemeanor, unless such drunkenness be occasioned by the fraud, contrivance, or force, of some other person or persons for the purpose of causing the perpetration of an offence; in which case the person or persons so causing said drunkenness, for such malignant purpose, shall be considered principal, or principals, and suffer the same punishment as would have been inflicted on the person or persons committing the offence, if he, she, or they had been possessed of sound reason and discretion.

"Sec. 10. Acts committed by misfortune or accident, shall not be deemed criminal, where it satisfactorily appears, that there was no evil design or intention, or culpable negligence.

"Sec. 11. A person committing a crime, or misdemeanor, not punishable with death, under threats or menaces which sufficiently shew, that his, or her life, or member was in danger; or that he, or she, had reasonable cause to believe, and did believe, that his, or her life or member was in danger, shall not be found guilty: and such threats or menaces being proved and established, the person or persons compelling by such threats, or menaces, the commission of the offence, shall be considered as principal or principals, and suffer the same punishment, as if he or she, had perpetrated the offence.

"Sec. 12. A person that becomes lunatic or insane after the commission of a crime or misdemeanor, ought not to be tried for the offence during the continuance of the lunacy or insanity. If after verdict of guilty, and before judgment pronounced, such persons become lunatic or insane, then no judgment shall be given, while such lunacy or insanity shall continue.

"And if after judgment, and before execution of the sentence, such person become lunatic or insane, then in case the punishment be capital, the execution thereof shall be stayed until the recovery of said person from the insanity or lunacy. In all of these cases, it shall be the duty of the court to empannel a jury to try the question, whether the accused be, at the time of empannelling, insane or lunatic."

Accessories in crimes.

"Sec. 13. An accessory is he or she, who stands by and aids, abets, or assists; or who not being present aiding, abetting, or assisting, hath advised and encouraged the perpetra-

tion of the crime. He or she, who thus aids, abets, or assists, advises, or encourages, shall be deemed and considered as principal, and punished accordingly.

"SEC. 14. An accessory after the fact, is a person who, after full knowledge that a crime has been committed, conceals it from the magistrate, or harbors and protects the person charged with or found guilty of the crime.

"Any person being found guilty of being an accessory after the fact, shall be imprisoned for any term not exceeding two years, and fined in a sum not exceeding five hundred dollars, in the discretion of the court, to be regulated by the circumstances of the case, and the enormity of the crime."

Who may be witnesses in criminal cases.

"SEC. 15. The party or parties injured, shall in all cases, be competent witnesses, unless he, she, or they, shall be rendered incompetent by reason of his, her, or their infamy or other legal incompetency, other than that of interest; the credibility of all such witnesses shall be left to the jury as in other cases.

"SEC. 16. No black or mulatto person, or Indian, shall be permitted to give evidence in favor, or against, any white person whatsoever. Every person who shall have one fourth part or more of negro blood, shall be deemed a mulatto, and every person who shall have one half Indian blood, shall be deemed an Indian.

"SEC. 17. Approvers shall not be allowed to give testimony.

"SEC. 18. The solemn affirmation of witnesses shall be deemed sufficient. A false and corrupt affirmation shall subject the witness to all the penalties and punishment provided for those who commit wilful and corrupt perjury."

CHAPTER II.

OF THE CHARGE OR COMPLAINT.

CRIMINAL prosecutions are carried on in the name of the people, and have for their principal object the security and safety of the people in general, and not mere private redress. But, as offences, for the most part, more particularly affect a particular individual, it is not usual for any other person to

interfere. In general, however, every man is, of common right, entitled to prefer an accusation against a party whom he suspects to be guilty. 1 *Chit. Crim. Law*, 1. Individuals thus legally entitled to prefer an accusation against a party suspected of crime, are, in general, bound by the strongest obligations both of reason and law, to exert the power with which they are invested. It must, indeed, be admitted, that revenge ought not to become the motive of their actions or occasion any unnecessary harshness in their proceedings. But, on the other hand, at least in cases of greater offences which affect the public, they have no right to forgive the injury which society has sustained, or to deprive mankind of that security which can alone result from the prompt detection and punishment of those by whom it is broken. The object of criminal prosecution is not vengeance for the past, but safety for the future; and, to the furtherance of this design, every man is bound to contribute. 1 *Chit. Crim. Law*, 3.

Punishment is not designed as an atonement or expiation for the crime committed, but as a precaution against committing, in future, offences of the same kind. 4 *Bl. Com.*, 11. This moral obligation is, in many cases, enforced by the laws themselves. Where a person is knowing of an act of treason being committed, and conceals it, he is guilty of misprision of treason. *Crim. Code*, *Sec.* 21. And, by the common law, a person knowing that a felony has been committed and concealing it, is guilty of an offence. 4 *Bl. Com.*, 121. And so he is by the statutes of this state. *Gale's Stat.*, 201.

It is important, however, when a complaint is made to a justice of the peace, that he should acquaint himself with the motives of the person making the same. A justice is sometimes liable to be imposed upon by the statements of the party complaining, which are often made under the influence of feelings excited by a strong sense of personal injury, sometimes from motives of revenge. And, where the application appears to be groundless, the justice should refuse to issue process.

When application is made to a justice of the peace for a warrant against the party accused, it becomes necessary to ascertain that a crime or misdemeanor has been actually committed, without which no warrant should be granted; and, also, the grounds of the accusation, or the cause and probability of suspecting the party, against whom the warrant is prayed. 4 *Bl. Com.*, 290.

It is a common error, into which many persons as well as justices of the peace have run, that a person has a right to demand a warrant, if he will swear positively. But such is not the law. The justice has a right to inquire into all the circumstances, and to satisfy himself. 3 *Wheeler's Crim. Cas.*, 183. And if there should be a positive charge upon oath, yet if the justice sees that no credit is to be given to it,

he may decline issuing a warrant. 1 *Chit. Crim. Law.*, 32. But he must act honestly and judiciously, as well towards the government as towards the party accused; he must have a "stout and upright heart, and clean and uncorrupted hands;" *Dalt's Justice*, 6; and when that is the case, he cannot be subjected to injury on account of his official conduct.

It is the duty of the justice well to consider all the circumstances sworn to, and not to grant a warrant groundlessly or maliciously, without such a probable cause as might induce a discreet and impartial man to suspect the party to be guilty. *Chit. Crim. Law*, 34.

If a justice of the peace, without complaint or information, should issue a warrant and cause a person to be arrested, trespass would lie against him; for, though he is excused when he issues a warrant on a false accusation; yet, it is otherwise where he issues his warrant without accusation. *Breese's Rep.*, 165.

The party who knows or suspects that an indictable offence has been committed, usually goes before a justice of the peace, accompanied by any other witnesses whom he may be able to procure, who then give to the justice all the information within their knowledge touching the same, stating the facts and circumstances upon which the charge is grounded. And it is necessary that the party making the charge, and all the witnesses, should be examined upon oath or affirmation, as well where a direct charge is made that a certain individual has committed an offence, as where the charge is, that an offence has been committed, and that the witness or witnesses have just and reasonable grounds to suspect that the person charged committed the same. *Gale's Stat.*, 238, 239.

It is said by Mr. Chitty, that it is the duty of the justice to take all charges, of whatsoever nature, kind, or complexion they may be, in writing. 1 *Chit. Crim. Law*, 34.

This, however, must be understood to be the modern practice; for, when justices of the peace were first authorized to grant out process against offenders, it was their custom to take the examination of the party and witnesses upon the delivery of the warrant, and to bind them over, by recognizance, to give evidence against the prisoner at the next jail-delivery. *Dalt. Justice*, 579. And it is said that it is safe, though not necessary, that the party who demands the warrant, as well as the witnesses, be first examined on oath touching the whole matter whereupon the warrant is demanded and that examination put in writing. 4 *Burn's Justice*, 389.

By the statute of Philip and Mary, justices before whom any prisoner is brought are required to take the examination of the prisoner and the information of them that bring him and put the same in writing. 1 *Chit. Crim. Law*, 74, 31. Under this statute, it appears to be necessary that the information of the prosecutor and witnesses, taken on oath before the issuing of

the warrant, must be in writing; 1 *Hale*, 586; and it is the practice, after the prisoner is arrested and brought before the justice, to re-swear the witnesses and read over their former depositions in the presence of the witnesses and the prisoner, and then the prisoner is at liberty to ask the prosecutor and witnesses any questions respecting the charge against him. 1 *Chit. Crim. Law*, 80.

In this state, we have no statute requiring that either the oath or examination shall be taken in writing. Upon application for a warrant, the oath or affirmation made before a justice of the peace may be made orally, and this is required for the purpose of enabling the justice to determine as to the propriety of issuing a warrant. And, by the common law, when application is made for a warrant against a person accused of a felony or other crime, it is not necessary for the complaint to be put in writing. 2 *Chit. Gen. Pr.*, 158. 3 *B. & Cres.* 649.

It being an obligation which all good citizens owe to the public when they shall have knowledge that an offence has been committed to give information thereof to some justice of the peace, the law always insures to such persons all due protection in the discharge of their duty.

And, as it would be a great discouragement to the object of his suspicions, it is settled that he cannot be sued for indicting a party unless his proceedings were both actuated by malice and destitute of any probable foundation. 1 *Chit. Crim. Law*, 10. Nor can any action be supported for a malicious prosecution of felony without producing a copy of the record of the indictment and acquittal, which are never granted, if the accusation was supported by any probable evidence; for it would be a very great discouragement to the public justice of the country, if prosecutors who had a tolerable ground of suspicion were liable to be sued at law whenever ther indictments miscarried. 3 *Bl. Com.*, 126. And, further to shelter the party indicting, his own oath in support of the charge may, in some cases, be given in evidence in his favor. 1 *Chit. Crim. Law*, 10.

CHAPTER III.

OF THE WARRANT.

If a justice of the peace see a felony or other breach of the peace committed in his presence, he may, in his own person, apprehend the felon, and so he may by word command any person to apprehend him, and such command is a good warrant without writing; but if the same be done in his absence, then he must issue his warrant in writing. 4 *Burn's Justice*, 389.

Whenever a statute gives to any one justice a jurisdiction over any offence, or a power to require any person to do a certain thing ordained by such statute, it impliedly gives a power to every such justice to make out a warrant to bring before him any person accused of such offence, or compellable to do any thing ordained by such statute; for it cannot but be intended that a statute giving a person jurisdiction over an offence doth mean, also, to give him the power incident to all courts of compelling the party to come before him. 4 *Burn's Justice*, 389. *Hawk.*, 34.

At common law, if a person committed a felony in the county of B., and then went into the county of C., upon information given to a justice of the peace for the county of C., he might issue his warrant to apprehend him, and take his examination and commit him to jail in the county of C., from whence he might be removed, by *habeas corpus*, to the county of B. for his trial. 1 *Chit. Crim. Law*, 35.

Sir Edward Coke hath laid it down, that a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion, before he is indicted, and the contrary practice is, by others, held to be grounded rather upon connivance than the express rule of law, though now, by long custom, established: a doctrine which would, in most cases, give a loose to felons to escape without punishment; and, therefore, Sir Mathew Hale hath combatted it with invincible authority, and strength of reasoning, maintaining,

1. That a justice of the peace hath power to issue a warrant to apprehend a person accused of felony, though not yet indicted.

2. That he may, also, issue a warrant to apprehend a person suspected of felony, though the original suspicion be not in himself, but in the party that prays his warrant, because he is a competent judge of the probability offered to him of such suspicion. 4 *Bl. Com.*, 290.

Since the undue execution of the power of issuing a war-

rant for the arrest of a person upon suspicion of felony or other misdemeanor, before indictment found against him, may prove highly prejudicial to the reputation as well as the liberty of the party, a justice cannot well be too tender in his proceedings of this kind, and seems to be punishable not only at the suit of the king, but, also, of the party grieved, if he grant any such warrant groundlessly and maliciously, without such a probable cause as might induce a candid and impartial man to suspect the party to be guilty. 2 *Hawk.*, 85.

By the 3d sec. of the act of Jan. 6, 1827, it is enacted that "It shall be lawful for any of the aforenamed judges or justices of the peace, upon oath or affirmation being made before him, that any person or persons have committed any criminal offence in this state, or that a criminal offence has been committed, and that the witness or witnesses have just and reasonable grounds to suspect that such person or persons have committed the same, to issue his warrant under his hand, commanding the officer, or person charged with the execution thereof, to arrest the person or persons so charged, and bring him, her or them before the officer issuing said warrant, or in case of his absence, before any other judge or justice of the peace, the said judge or justice of the peace, before whom any person shall be brought in pursuance of such warrant, or shall be brought without warrant, and charged with any criminal offence, before he shall commit such prisoner to jail, admit to bail, or discharge him or her from custody, shall inquire into the truth or probability of the charge exhibited against such prisoner or prisonsers, by the oath of all witnesses attending." *Gale's Stat.*, 238.

A general warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion. And a warrant to apprehend all persons guilty of a crime therein specified, is no legal warrant. Such a process would not only be void, but an action for false imprisonment lies against the officer who acts under it. 4 *Bl. Com.*, 291.

By Art. VIII., Sec. 7, of the constitution, it is declared "That the people shall be secure in their persons, houses, papers, and possessions from unreasonable searches and seizures; and that general warrants whereby an officer may be commanded to search suspected places without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty, and ought not to be granted."

By the common law, warrants of justices of the peace may be styled and made after divers manners; as,

1. In the name of the king, and yet the test must be under the name of the justice who grants it out;

2. It may be styled or made only in the name of the justice; or,

3. It may be made without any style and only under the test of the justice, or only subscribed by him. *Dalt. Justice*, 593.

In this state, the warrant runs in the name of *The people of the state of Illinois*. This form is prescribed by the constitution, the seventh section of the fourth article of which declares that "All process, writs and other proceedings shall run in the name of the people of the state of Illinois."

The warrant is better if it bear date of the place where it is made, which, in pleading, must be alleged, though it need not be expressed in the warrant. And it is safe, but, perhaps, not necessary, to show, in the body of the warrant, the place where it was made; yet, it seems necessary to set forth the county in the margin at least, if it be not set forth in the body. 4 *Burn's Justice*, 391.

It is laid down in English treatises, that a justice of the peace may direct his warrant to the sheriff, bailiff, constable, or other officer, or to any other indifferent person by name, though he be no officer. *Dalt. Justice*, 577.

The warrant is ordinarily directed to the sheriff or constable, and they are indictable and subject to a fine and imprisonment if they neglect or refuse it. But if it is directed to a private person it is good, but he is not compellable to execute it. 1 *Burn's Justice*, 105.

Yet, it is said that, if a statute direct that a justice shall grant a warrant, and doth not say to whom it shall be directed, by consequence of law, it must be directed to the constable, and it cannot be directed to the sheriff, unless such power is given in the act. *Ld. Raym.*, 1192. 2 *Salk.*, 381.

Where a warrant is directed to several, it may be executed by one; but it is said that, if it direct them jointly and not severally to arrest, then they must all be present. 1 *Chit. Crim. Law*, 49.

A warrant directed by a justice of the peace to the constable, or other sworn officer, and to a stranger who is no officer, and the warrant is made jointly and severally, and is delivered to the stranger, who executes it, this is good. *Dalt. Justice*, 577.

By the 7th sec. of the act of Jan. 6, 1827, it is enacted that, "When a charge shall be exhibited upon oath before any judge, or justice of the peace, against any person for a criminal offence, it shall be the duty of the judge or justice of the peace before whom the charge shall be made, to issue his warrant for the apprehension of the offender, directed to all sheriffs, coroners, and constables, within the state." *Gale's Stat.*, 239.

By the 8th sec. it is enacted that "Any judge or justice of the peace, issuing any such warrant, may make an order

thereon, authorizing a person to be named in such warrant to execute the same, and the person named in such order may execute such warrant anywhere in the state, by apprehending and conveying such offender before the judge or justice issuing such warrant, or before some other justice of the same county, and all sheriffs, coroners, and constables, and others, when required in their respective counties, to be aiding and assisting in the execution of such warrant." *Gale's Stat.*, 240.

The name of the party to be apprehended, if known, must be correctly stated in the warrant before it is issued, and not left in blank to be filled up afterwards. 1 *Chit. Crim. Law*, 39.

If the process be defective in this particular, that is, if there be a mistake in the name of the person on whom it is to be executed, it is fatal to the process, and may be injurious to the officer. *Foster*, 312. 1 *East P. C.*, 310. 7 *Cowen's Rep.*, 332.

But, if the name of the party to be arrested be unknown, the warrant may be issued against him by the best description the nature of the case will allow; as "the body of a man whose name is unknown, but whose person is well known, and who is employed as the driver of a four horse team, and has lost one eye." 1 *Hale*, 577. 1 *Chit. Crim. Law*, 39.

By some of the authorities, it does not seem to be absolutely necessary to set out the charge or evidence in a warrant to apprehend, though it is necessary in the commitment; but that it is advisable, especially if the warrant be for the peace or good behavior, to set forth the special cause for which it is granted, in order that the party may come prepared before the justice with sufficent sureties; but that, if it be for treason, or felony, or other offence of an enormous nature, it is not necessary to state it, and that it seems rather discretionary than necessary to set it forth in any case. 1 *Chit. Crim. Law*, 41.

In Boucher's case, *Cro. Jac.*, 81, it was held that a commitment under a warrant which did not specify the crime the party was charged with, was a false imprisonment, but that the offence need not be specified in a warrant to bring up the party for examination or trial. And the same doctrine seems to be held in the case of the King *v.* Wilkes, 2 *Willes' Rep.*, 153.

It is laid down by Lord Hale, that, regularly, a warrant ought to contain the cause specially, and should not be general, to answer such matters as shall be objected against him, because it cannot appear whether it be within the jurisdiction of the justice, neither can it appear whether the party be bailable or otherwise. 2 *Hale*, 111. 1 *Hale*, 580. Though he admits it would be valid without it.

And Mr. Lambard, in his treatise, says, that every warrant made by a justice of the peace ought to comprehend the spe-

cial matter upon which it proceedeth, even as all the king's writs do bear their proper cause in their mouth with them; and, as for the form that is commonly used, *to answer to such things as shall be objected*, and such like, they were not fetched out of the old learned precedents, but lately brought in by such as either knew not, or cared not, what they writ. 4 *Burn's Justice*, 392. 4 *Bl. Com.*, 290.

The reason assigned, by the English common law writers, why it is not necessary to set out the offence in the warrant, viz., "that cases may occur in which it would be imprudent to let even a peace officer know the crime of which the party to be arrested is accused," seems to be weak and unsatisfactory. It shows a want of confidence in those officers, who are bound by the strongest obligations to sustain and enforce the laws, or a consciousness that the proceedings, on the part of the government, are corrupt and tyrannical, and, if fully known, would be resisted by and oppressed and indignant people.

In this state, the rights of the people are more certainly secured. By Sec. 9 of Art. VIII. of the constitution, it is declared "That in all criminal prosecutions, the accused hath a right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his favor."

In order to render this provision of the constitution effectual, and that the party may be fully apprised of the nature and cause of the accusation against him, it seems that the same should be substantially set forth in the warrant, and that it should not be left to the discretion of the justice to inform him of the charge or evidence, as interest, fear, or caprice may dictate.

The party accused is entitled to the full benefit of the constitutional provision in his favor, and to know the precise nature of the offence against which he is called to defend himself, previous to going into an investigation on the part of the people; so that he may obtain counsel and procure the attendance of such witnesses as may be material for his defence. But, whether it is necessary or not, by the constitution and laws of this state, that the warrant should contain the special cause and matter upon which it is granted, there is no necessity, nor even an apology, for issuing a causeless and uncertain precept, especially one which controls the personal liberty of an individual and requires him to defend himself against a criminal accusation.

The warrant may issue to bring the party before the justice who granted the warrant specially, and then the officer is bound to bring him before the same justice; but if the warrant be general, to bring him before any justice, then it is in the election of the officer to bring him before what justice of the county he may think fit, and not in the election of the

prisoner. 1 *Chit. Crim. Law*, 60. And it is even said that, where a warrant directs a person to be brought before a particular magistrate, he may be taken before another, especially if nearer. 1 *Chit. Crim. Law*, 60.

By the statute of this state, it is provided that it shall be lawful for any judge or justice to issue his warrant under his hand, commanding the officer or person charged with the execution thereof to arrest the person or persons charged with having committed any criminal offence, and bring him, her, or them before the officer issuing said warrant, or, in case of his absence, before any other judge or justice of the peace. *Gale's Stat.*, 238.

The warrant of a justice need not be returnable at a time or place certain, and, as it is not returnable at a certain time, it continues in force until fully executed and obeyed, provided the justice be living. 1 *Chit. Crim. Law*, 39.

It is said, the warrant ought to set forth the year and day wherein it is made, that, in an action brought upon an arrest by virtue of it, it may appear to have been prior to such arrest; and, also, in case where a statute directeth the prosecution to be within such a time, that it may appear that the prosecution is commenced within such limited time. 2 *Hawk.*, 85. But the place where the warrant is made, though it must be alleged in pleading, need not be expressed in the warrant; but it is said that it is necessary to state the county in the margin, at least, if it be not set forth in the body. 1 *Chit. Crim. Law*, 39.

It is generally laid down, that the warrant ought to be under the hand and seal of the justice who made it. 1 *Chit. Crim. Law*, 38. But it seems sufficent if it be in writing, and signed by him, unless a seal is expressly required by statute. 1 *Chit. Crim. Law*, 38. *Bull. N. P.*, 83. 19 *Johns. Rep.*, 39.

By the 10th sec. of the act of Jan. 6, 1827, it is enacted that "It shall not be necessary to the validity of any warrant for the apprehension of any person charged with an offence, or warrant of commitment, or search warrant, that it be under the seal of the judge or justice of the peace granting or issuing the same; but every such warrant under the hand of the judge or justice of the peace, shall be as valid in law as if a seal were affixed."

CHAPTER IV.

OF THE ARREST.

An arrest is the apprehending or restraining of one's person, in order to be forthcomming to answer an alledged or suspected crime. To this arrest all persons whatsoever are, without distinction, equally liable in all criminal cases. 4 *Bl. Com.*, 289.

If the constable, or other officer, upon receiving a warrant, shall come to the party and require or command him to go before the justice, &c., this is no arrest or imprisonment. *Dalt. Justice*, 580. Bare words will not amount to an arrest without the party's being taken into actual custody. 1 *Salk. Rep.*, 79.

To constitute an arrest, the party against whom the process is awarded, must either be actually touched by the officer, or confined in a room, or must submit himself, either by words or actions, to be in custody. 1 *Chit. Crim. Law*, 48. If the party acquiesces and goes along with the officer, this will be considered as submitting himself to the process, and as complete an arrest as if the officer had touched the person of the defendant. 2 *Selwyn's N. P.*, 1152. 2 *Stark. Ev.*, 812.

And it has been held that it is enough for a sworn and known officer to say to a man being present, "I arrest you for felony, &c., in the king's name," though he touch him not. And if the party go away it is a rescue. 2 *Hale*, 116. *Dalt. Justice*, 580.

In general, an arrest may be made in four ways: 1. By warrant; 2. By an officer without a warrant; 3. By a private person, also without a warrant; 4. By an hue and cry.

1. *By warrant.*

The officer to whom the warrant is delivered should, as soon he conveniently can, proceed with secrecy to find out and actually arrest the party; and, if he refuse or neglect to execute the warrant, he will be punishable for his disobedience or neglect. 1 *Chit. Crim. Law*, 47.

By sec. 102 of the Crim. Code: "If any sheriff, coroner, keeper of a jail, constable, or other officer, shall wilfully refuse to receive or arrest any person charged with a criminal offence, then such sheriff, coroner, jailer, constable or other officer shall, on conviction, be fined not exceeding five hundred dollars, and imprisoned not exceedig six months in the common jail."

By the 7th sec. of the act of Jan. 6, 1827, it is provided that, "When a charge shall be exhibited upon oath before any judge, or justice of the peace, against any person for a criminal offence, it shall be the duty of the judge or justice of the peace before whom the charge shall be made, to issue his warrant for the apprehension of the offender, directed to all sheriffs, coroners, and constables, within the state; and it shall be the duty of any sheriff, coroner, or constable, into whose hands any such warrant shall come, to execute the same within their respective counties, and if the offender shall be found therein, to arrest and convey such offender before the judge or justice of the peace who issued the warrant, or before some other justice of the peace of the same county. When any such sheriff, coroner, or constable, or other person called to the assistance of such sheriff, coroner, or constable, shall be in pursuit of any offender, having a warrant for the apprehension of such offender, and the offender shall cross the line into the adjoining county, such sheriff, coroner, constable, or other person may pursue such offender into such adjoining county and make the arrest, as if such offender had been found in the county of the officer in pursuit.

"Sec. 8. Any judge or justice of the peace, issuing any such warrant, may make an order thereon, authorizing a person to be named in such warrant to execute the same, and the person named in such order may execute such warrant anywhere in the state, by apprehending and conveying such offender before the judge or justice issuing such warrant, or before some other justice of the same county, and all sheriffs, coroners, and constables, and others, when required in their respective counties, to be aiding and assisting in the execution of such warrant.

"Sec. 9. Any person or persons, officer or officers, who may have the custody of any offender or offenders, by virtue of either of the two preceding sections, may take or carry such prisoner or prisoners into any other county which may be situated on his or their way back to the county from which the said prisoner or prisoners fled, and may deposit such prisoner or prisoners in any jail on his or their route, for safe custody, for one night or more, as occasion may require. Upon their arriving in the county to which the prisoner or prisonors is or are sent, under the last preceding section, such officer or officers, person or persons, shall deliver such prisoner or prisoners into the custody of the sheriff or jailer, together with the warrant of the said judge or justice, which shall be a sufficient justification to the said sheriff or jailer to receive and detain such prisoner or prisoners, until he, she, or they obtain bail, if the offence be bailable, or be otherwise discharged by due course of law."

It is said that, inasmuch as the office of a constable is wholly ministerial, and no way judicial, it seems that he may

appoint a deputy to execute a warrant directed to him, when, by reason of sickness, absence, or otherwise, he cannot do it himself; yet it doth not seem to be settled, that a constable can make a deputy without some special cause. 2 *Hawk.*, 62. *Dalt. Justice*, 4, 84. 2 *Stark. Ev.*, 435, *note* (o).

It is, however, apprehended that, as all warrants are, by the statute of this state, directed to all sheriffs, coroners, and constables and not to any one of them by name, there can be no necessity for a constable appointing a deputy.

An officer is justified in executing a warrant legal in itself, granted by one who had a general jurisdiction over the subject matter, although it was erroneously or corruptly granted in the particular case. 5 *Wend. Rep.*, 170. 13 *Mass. Rep.*, 286. 1 *Scam. Rep.*, 200. It would manifestly be unjust, that a mere ministerial officer, who was bound at his peril to execute the process, should suffer for doing what he supposed to be perfectly legal, in the execution of a warrant apparently valid and which was rendered illegal by facts not within his knowledge. It is sufficient to justify the officer executing process to know that the court issuing it had jurisdiction of the subject matter. He is not bound to examine into the validity of the proceedings or the regularity of the process. Even if it is issued erroneously, he would not be a trespasser for executing it. *Breese's Rep.*, 284.

But it is a general principle of law, that, where courts of justice assume a jurisdiction which they do not possess, an action of trespass lies against the officer who executes process, because the whole proceedings, in such a case, are *coram non judice;* and where there is no jurisdiction there is no judge, and the proceeding is as nothing. 2 *Willes' Rep.*, 384.

It is presumed, however, that, although a justice may be liable to an action for issuing a warrant for a cause unauthorized by law and, perhaps, the party demanding the warrant, yet, if the warrant appears to be legal and valid upon the face of it, and such as the justice had a right to issue, that the officer executing the same would be protected. But, if it appear, on the face of the warrant, that the offence is one over which the justice of the peace had no jurisdiction, he could not justify an arrest under it. 2 *Stark. Ev.*, 437.

For all treasons, felonies, and breaches of the peace, the party accused or suspected may be arrested on Sunday. 3 *Bl. Com.*, 280.

And the party may be arrested in the night as well as the day. 1 *Burn's Justice*, 105.

It is laid down that constables, if they be sworn and commonly known to be officers and act within their jurisdiction, need not show their warrant to the parties whom they come to apprehend, notwithstanding they demand the sight of it; but that these and all other persons making an arrest ought to acquaint the party whom they are to apprehend with the sub-

stance of their warrants. It is, also, enjoined on all private persons to whom a warrant may be directed, and even officers, if they be sworn and commonly known, or if they act out of their own jurisdiction, to show their warrants, if demanded. 1 *Chit. Crim. Law*, 51. It is, however, considered advisable, even in case of a known officer, when the arrest is made by virtue of a warrant, if his authority is demanded, to produce the warrant.

Any justice of the peace, sheriff, or constable may take of the county any number that he shall think proper, to pursue, arrest, and imprison traitors, murderers, robbers, and other felons, and such as do break, or go about to break or to disturb the peace; and every man, being required, ought to assist and aid them, on pain of fine and imprisonment. But it is not justifiable for a justice, sheriff, or other officer to assemble the *posse comitatus*, or raise a power or assembly of people, without just cause. But, where such officers are enabled to take the power of the county, it seems that they may command and ought to have the aid and attendance of all persons above the age of eighteen years and able to travel. *Gale's Stat.*, 224. And, in such case, it is referred to the discretion of the justice, sheriff, or constable what number they will have to attend on them, and after what manner they shall be armed or otherwise furnished. *Dalt. Justice*, 588. 1 *Burn's Justice*, 106.

A constable may justify the breaking of doors, on a warrant to arrest for felony; and even on a warrant to arrest for breach of the peace, an officer may break open the doors of the party. 1 *Hale*, 582. 2 *Hale*, 117.

But a man's house is regarded as his castle, which is only to be violated when absolute necessity compels the disregard of smaller rights in order to secure public benefit; and, therefore, in all cases where the law is silent, and express principles do not apply, this extreme violence is illegal. 1 *Chit. Crim. Law*, 52.

In case of breaking open doors in order to apprehend offenders, it is to be observed that, as the law doth never allow of such extremities but in cases of necessity, therefore no one can justify the breaking open another's door to make an arrest, unless he first signify to those in the house the cause of his coming and request them to give him admittance. 2 *Hale*, 116.

Where a person authorized to arrest another who is sheltered in a house is denied quietly to enter into it in order to take him, it seems generally to be agreed, that he may justify breaking open the door, when a person is known to have committed a treason or felony, or to have given a dangerous wound, and is pursued either with or without a warrant, by a constable or private person. But, where one lies under a probable suspicion only and is not indicted, it seems the bet-

ter opinion, at this day, (Mr. Hawkins says,) that no one can justify the breaking open doors to apprehend him; and this opinion he founds on Lord Coke's 4 *Inst.*, 177. 2 *Hawk.*, 87. But Lord Hale, in his history of the pleas of the crown, says that, upon a warrant for probable cause of suspicion of felony, the person to whom such warrant is directed may break open doors to take the person suspected, if, upon demand, he will not surrender himself, as well as if there had been an express and positive charge against him; and so (he says) hath the common practice obtained, notwithstanding the contrary opinion of Lord Coke; for, in such case, the process is for the king, and, therefore, a *non omittas* is implied. 1 *Burn's Justice*, 107.

And Mr. Chitty says, it is now clear that, in all cases, doors may be broken open, if the offender cannot otherwise be taken under warrant for treason, felony, suspicion of felony, or actual breach of the peace, or to search for stolen goods. In these cases, too, a warrant is a complete justification to the person to whom it is directed, acting *bona fide* under it, even though the party accused should prove to be innocent. 1 *Chit. Crim. Law*, 54.

Under our statute, it is apprehended that a constable would be equally as justifiable in breaking open doors to arrest a person suspected of having committed a criminal offence, as if the charge was direct and positive. And, as he may break open such person's own house, so much more may he break open the house of another to take him; for so the sheriff may do upon civil process. But he must, at his peril, see that the felon be there; for, if the felon be not there, he is a trespasser to the stranger whose house it is. 2 *Hale*, 117.

In a civil suit, the officer cannot justify the breaking open an outside door or window in order to execute process. If he doth, he is a trespasser. But if he finds the outward door open and enters that way, or if the door be opened to him from within, and he enters, he may break open inward doors, if he finds that necessary in order to execute his process. *Cowp. Rep.*, 1, 5. 5 *Bos. & Pull.*, 211. But a man's house is his castle for the safety and repose of himself and family only, and the rule does not extend to a stranger who takes refuge therein. 5 *Coke's Rep.*, 91.

This rule, however, is confined to the case of arrest upon process in civil suits only. For, where a felony has been committed, or a dangerous wound given, or, even, where a minister of justice cometh armed with process founded on a breach of the peace, the party's own house is no sanctuary for him. In these cases, the justice which is due to the public must supersede every pretence of private inconvenience. *Foster*, 320.

If an officer, to serve any warrant, enters into a house, the doors being open, and then the doors are locked upon him, he

may break them open in order to regain his liberty. 2 *Hawk*, 87.

Where a warrant is issued against a person for felony, and, either before arrest or after, he flies and defends himself with stones or weapons, so that the officer must give over his pursuit, or otherwise cannot take him without killing him, if he kill him, it is no felony, because the law enjoins a constable to take a felon, and, if he omits his duty, he is indictable and subject to fine and imprisonment. 1 *Chit. Crim. Law*, 23.

If such person, either upon the attempt to arrest, or after the arrest, assault the officer, to the intent to make his escape from him, and the officer, standing upon his guard, kill him, this is no felony; for he is not bound to go back to the wall, as in common cases of defending one's own person, for the law is his protection. 2 *Hale*, 118.

Where an officer of justice is resisted in the legal execution of his duty, he may repel force by force, and if, in doing so, he kill the party resisting him, it is justifiable homicide, and this in civil as well as in criminal cases. *Arch. Crim. Pr.*, 333. And the same as to persons acting in aid of such officer.

Still, there must be an apparent necessity for the killing; for, if the officer were to kill after the resistance had ceased, or if there were no reasonable necessity for the violence used upon the part of the officer, the killing would be manslaughter, at the least. *Arch. Crim. Pr.*, 333.

Where an officer or private person, having legal authority to apprehend a man, attempts to do so, and the man, instead of resisting, flies, or resists and then flies, and is killed by the officer or private person in the pursuit, if the offence with which the man was charged were treason, or felony, or a dangerous wound given, and he could not otherwise be apprehended, the homicide is justifiable. *Arch. Crim. Pr.*, 334.

But, if there be a warrant against a person for a breach of the peace or other misdemeanor merely, and he flies and will not yield to the arrest, or, being taken, makes his escape, if the officer kills him, it is murder, 1 *Hale*, 481. 2 *Hale*, 117, unless, indeed, the homicide were occasioned by means not likely or intended to kill, in which case the homicide, at most, would be manslaughter only. *Foster*, 271.

If the warrant be, in itself, defective, or if it be not enforced by a proper officer, or if it be executed out of the jurisdiction &c., or the wrong person be taken under it, the party may legally resist the attempt to apprehend him, and even third persons may lawfully interfere to oppose it, doing no more than is necessary for that purpose. 1 *Chit. Crim. Law*, 60.

But, if the process be legal and duly executed, resistance and interference are illegal and subject the parties to an indictment. 1 *Chit. Crim. Law*, 61.

By sec. 92 of the Crim. Code, "If any person shall, knowingly and wilfully obstruct, resist, or oppose, any sheriff, de-

puty sheriff, coroner, constable, or other officer of this state, or other person duly authorized, in serving, or attempting to serve any lawful process or order of any court, judge, or justice of the peace, or any other legal process whatsoever, or shall assault or beat, any sheriff, deputy sheriff, coroner, constable, or other officer, or person duly authorized in serving or executing, or attempting to serve or execute any process or order aforesaid, or for having served or executed, or attempted to serve or execute the same, every person so offending shall be fined in any sum not exceeding five hundred dollars, and imprisoned for a term not exceeding one year: *Provided*, Any officer or person whatever that may or shall assault or beat any individuals under color of his commission or authority, without lawful necessity so to do, shall, on conviction, suffer the same punishment."

If, when a man is apprehended and in the custody of an officer, a third person interferes, or espouses his cause, and encourages the prisoner to resist, the officer may arrest the third person for thus opposing the operation of justice. 1 *Chit. Crim. Law*, 61. *Peake's Rep.*, 89.

When an officer has made an arrest by virtue of a warrant, it is his duty to bring the party forthwith, according to the direction thereof. 2 *Hale*, 112. But, if the time be unreasonable, as in or near the night whereby, he cannot attend the justice, or if there be danger of a rescue, or the party be ill and unable at present to be brought, he may, as the case shall require, secure him in the stocks, or, in case his indisposition so require, detain him in a house till the next day, or until it may be reasonable to bring him. 2 *Hale*, 119, 95.

If the warrant be to bring the party before the justice who issued it, then the officer is bound to bring him before the same justice; but, if the warrant be to bring him before any justice, then the power of election is vested in the officer, and not in the prisoner, and the former may proceed to any justice who has jurisdiction in the county. 1 *Chit. Crim. Law*, 60. And it is even said that, where a warrant directs a person to be brought before a particular justice, he may be taken before another, especially if nearer. 1 *Chit. Crim. Law*, 60.

But, by the 3d sec. of "An act to regulate the apprehension of offenders and for other purposes," it shall be lawful for the justice to issue his warrant under his hand, commanding the officer, or person charged with the execution thereof, to arrest the person or persons so charged, (with having committed a criminal offence,) and bring him, her, or them before the officer issuing the said warrant, or, in case of his absence, before any other judge or justice of the peace.

And, by the 7th sec. of the same act, It shall be the duty of any sheriff, coroner, or constable into whose hands such warrant shall come, to execute the same within their respective counties, and if the offender shall be found therein, to arrest

and convey such offender before the judge or justice of the peace who issued the warrant, or before some other justice of the peace of the same county.

It is said that, where an arrest has been made without warrant, the constable may, in some cases, take the party's word for his appearance before the justice. And this is usually done where the charge is for an assault of a trifling nature and the defendent is of good repute and there is no probability of his absconding. 1. *Chit. Crim. Law*, 59.

If a prisoner who has been arrested do escape, through the negligence of the officer, he may, upon fresh pursuit, retake the prisoner at any time, whether he find him in the same or a different county, without raising hue and cry, because, as the liberty obtained by the prisoner is wholly owing to his own wrong, there is no reason why he should be allowed to derive any advantage from it. 2 *Hawk.*, 81. 2 *Hale*, 115.

It has been held that, if any officer or other person hath arrested a man by virtue of his warrant, and then takes his promise that he will come again to him such a day, to go before the justice with him according to his warrant, and so letteth the party go, who comes not again at the day appointed, the officer cannot arrest or take him again by force of the same warrant, for that this was by the consent of the officer. *Dalt. Justice*, 478. Yet, Mr. Chitty says it would seem that, as the public are interested in the offender's being brought to justice, there is no well-founded objection to such second arrest. 1 *Chit. Crim. Law*, 59, 61. 1 *Burn's Justice*, 110.

It appears to be settled that, if the constable shall voluntarily suffer the prisoner to escape, who again returns into the custody of the constable, he may lawfully detain him, in pursuance of his original warrant. 1 *Chit. Crim. Law*, 60.

A rescue is the forcibly and knowingly freeing another from an arrest or imprisonment. 4 *Bl. Com.*, 131. It is necessary that the rescuer should have knowledge that the person whom he sets at liberty has been apprehended for a criminal offence, if he be in the custody of a private person; but, if he be under the care of an officer, then he must take notice of it at his peril. 1 *Hale*, 606.

The mere prevention of the arrest of a person for a criminal offence is a misdemeanor. 1 *Chit. Crim. Law*, 62. And, after the officer has made an arrest, it is provided, by sec. 100 of the Crim. Code, that, "If any person shall aid or assist any prisoner to attempt to escape, or shall rescue or attempt to rescue any prisoner from the custody of any sheriff, deputy sheriff, coroner, constable, officer, or other person, who shall have the lawful custody of such prisoner, every person so offending shall, upon conviction thereof, be fined not exceeding one thousand dollars, and imprisoned in the county jail not exceeding one year.

"SEC. 101. If any sheriff, coroner, jailer, keeper of a prison, constable, or other officer, or person whatever having any prisoner in his legal custody, before conviction, shall voluntarily suffer or permit such prisoner to escape or go at large, every such officer or persons so offending shall, on conviction, be fined in any sum not exceeding one thousand dollars, and imprisoned in the county jail for any term not exceeding six months: *Provided*, That if such prisoner be in custody charged with murder or other capital offence, then such officer or person suffering or permitting such escape, shall be punished by confinement in the penitentiary for any term not less than one year, nor more than ten years. A negligent escape of a person, charged with a criminal offence, before conviction, from the custody of any of the aforesaid officers shall be deemed a misdemeanor, and punished by fine, not exceeding five hundred dollars."

When the prisoner is brought before the justice, he is still considered in the custody of the officer until he has been either discharged, bailed, or committed to prison. 2 *Hale*, 120. And he may keep his warrant for his own justification, and need only return to the justice what he has done in pursuance of its commands. 1 *Chit. Crim. Law*, 60.

It is usual, however, in practice, when the officer brings the prisoner before the justice, to return the warrant to the justice, so that the prisoner may thus be informed of the precise charge upon which he has been apprehended.

2. *By an officer without warrant.*

Arrests, by officers without warrant, may be made,

1. By a justice of the peace, who may himself apprehend or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence. 4. *Bl. Com.*, 292. Where the justice of the peace is not present when the crime has been committed, he ought not, upon mere discretion, to send the party accused to prison, but upon due consideration of the evidences adduced before him. And it seems that, in case a justice has notice, or a particular knowledge, that a person has been guilty of an offence, yet it is not a sufficient ground for him to commit the criminal; but, in that case, he is rather a witness than a magistrate, and ought to make oath of the fact before some other justice, who should thereupon act the official part by granting a warrant to apprehend the offender, it being more fit that the accuser should appear as a witness than act as a magistrate. 1 *Chit. Crim. Law*, 25.

2. By sheriffs; who are not only enabled, but enjoined, to arrest felons, and all persons are required to assist them therein, when requested, and they are respectively punishable, by fine and imprisonment, in case they neglect their duty.

The sheriff may, also, arrest a person suspected of a capital offence whose guilt is not certain. 1 *Chit. Crim. Law*, 26.

And, if the sheriff be assaulted in the execution of his duty, he may apprehend the offender and keep him in prison for a reasonable time, to be carried before a justice of the peace to be committed or find bail to answer the offence. 1 *Saund.*, 77. 1 *Taunt. Rep.*, 147.

3. A coroner is a conservator of the peace, in relation to all felonies, and may arrest, or cause another to arrest, any felon. 1 *Chit. Crim. Law*, 26.

4. By constables. A constable has great original and inherent authority with regard to arrest. He may, without warrant, arrest any one for a felony or a breach of the peace committed in his view and carry him before a justice of the peace. And, in case of felony actually commited, or a dangerous wounding whereby felony is like to ensue, he may, upon probable suspicion, arrest the felon, and, for that purpose, is authorized (as upon a justice's warrant) to break open doors, and even kill the felon, if he cannot otherwise be taken; and, if he or his assistant be killed in making such arrest, it will be murder in all concerned. 4 *Bl. Com.*, 292.

And a constable, upon a reasonable charge of felony, may justify an arrest without warrant, although no felony has been committed, because he cannot judge whether the party be guilty or not till he come to his trial, which cannot be till after his arrest; and it is said that, if a man charges another with a felony and requires an officer to take him into custody and carry him before a justice, it would be most mischievous that the officer should be bound first to try and, at his peril, exercise his judgment on the truth of the charge. He that makes the charge should alone be answerable. The officer does his duty in conveying the accused before a justice who is authorized to examine and commit, or discharge. 1 *Chit. Crim. Law*, 22. 2 *Stark. Ev.*, 439.

And a constable may arrest any person who breaks the peace in his own view, and keep him in his house, or some secure place, till he can bring him before a justice. 1 *Hale*, 587. In general, when an affray takes place in his presence, he may either keep the parties in custody till it is over, or he may carry them immediately before a justice. 1 *Chit. Crim. Law*, 20. And it would seem that, even upon a charge of a breach of the peace not committed in the view of the constable, if he arrest the party, and no breach of the peace was committed, the person who preferred the charge alone is liable. 2 *Hale*, 90. Though it has been held, that a constable cannot arrest for an affray or breach of the peace not committed in his view. 1 *East. P. C.*, 305. 1 *Chit. Crim. Law*, 23.

If the constable has no warrant, but makes the arrest by virtue of his office as constable, it would be well to inform

the party by what authority he makes the arrest; and it is sufficient to notify that he is constable, or that he arrests in the name of the people. 1 *Hale*, 582.

It is advisable, in all cases not requiring immediate interference, for a constable or other officer to act under a warrant.

3. *By a private person without a warrant.*

Any private person that is present when any felony is committed is bound, by the law, to arrest the felon, on pain of fine and imprisonment if he escape through his negligence. 2 *Hawk.*, 74.

But a private person cannot arrest for an offence inferior to felony not committed within his view. 2 *Stark. Ev.*, 441. He may justify breaking open doors upon following such felon; and, if they kill him, provided he cannot be otherwise taken, it is justifiable; though if they are killed in endeavoring to make such arrest, it is murder. 2 *Hale*, 77. Upon probable cause of suspicion, also, a private person may arrest the felon or other person so suspected, and, if it can be proved that a felony has been committed by some person, and there was a reasonable and probable ground for suspicion, he will not be liable to an action, though it shall afterwards be proved that the party imprisoned was innocent. 1 *Chit. Crim. Law*, 17. 2 *Stark. Ev.*, 441. But a private person cannot justify breaking open doors to apprehend another on probable suspicion of felony; and if he do, and either party is killed in the attempt, it is manslaughter, and no more. 2 *Hale*, 82. It is no more, because there is no malicious design to kill, but it amounts to so much, because it would be of most pernicious consequence if, under pretence of suspecting felony, any private person might break open a house or kill another. 4 *Bl. Com.*, 293.

With respect to interference and arrests in order to prevent the commission of a crime, any person may lawfully lay hold of a person whom he may see on the point of committing a felony, or doing any act which will manifestly endanger the life or person of another, and may detain him until it may be reasonably presumed that he has changed his purpose. But, where he interferes to prevent others from fighting, he should first notify his intention to prevent the breach of the peace. 1 *Hale*, 589. 1 *East. P. C.*, 304. 2 *Stark. Ev.*, 441. Any one may justify breaking and entering a party's house and imprisoning him, to prevent him murdering his wife, who cries for assistance. 1 *Chit. Crim. Law*, 18.

A private person who has apprehended another for felony may deliver the prisoner into the hands of a constable, or cause him to be brought before a justice of the peace. 2 *Hale*, 77, 81.

4. *By an hue and cry.*

Hue and cry is the old common law process of pursuing, with horn and voice, all felons and such as have dangerously wounded another. 4 *Bl. Com.*, 293.

By the 2d sec. of the act of Jan. 6, 1827, it is provided that, "When any felonious offence shall be committed, public notice thereof shall be immediately given, in all public places near where the same was committed, and fresh pursuit shall be forthwith made after every person guilty thereof, by sheriffs, coroners, constables and all other persons, who shall be by any of them commanded or summoned for that purpose: every such officer who shall not do his duty in the premises shall be punished by fine, in a sum not exceeding one hundred dollars, or imprisonment not exceeding three months." *Gale's Stat.*, 238.

Hue and cry may be raised either by precept of a justice of the peace, or by a peace officer, or by a private man that knows of a felony. 4 *Bl. Com.*, 294. For levying hue and cry, although it is a good course to have the warrant of a justice of the peace, when time will permit, in order to prevent causeless hue and cry, yet it is not always convenient, for the felon may escape before the warrant can be obtained. 2 *Hale*, 99. And, by the above statute, it does not appear to be necessary that there should be a warrant.

When any felony iscommitted, or any person is greviously and dangerously wounded, or any person assaulted and offered to be robbed, either in the day or at night, the party grieved or any other, may resort to the constable and, 1. Give him such reasonable assurance thereof as the nature of the case will bear. 2. If he knows the name of him that did it, he must tell the constable the same. 3. If he knows it not, but can describe him, he must describe his person, or his habit, or his horse, or such circumstances as he knows, which may conduce to his discovery. 4. If the thing be done in the night, so that he knows none of the circumstances, he must mention the number of the persons or the way they took. 5. If none of all these can be discovered, as where a robbery, or burglary, or felony is committed in the night, yet they are to acquaint the constable with the fact, and desire him to search in his county for suspected persons, and to make hue and cry after such as may be probably suspected, as being persons vagrant in the same night; for many circumstances may, *ex post facto*, be useful for discovering a malefactor, which cannot be at first found. 2 *Burn's Justice*, 650. 2 *Hale*, 100.

And it is the duty of the constable to raise the power of the county as well in the night as in the day for the prosecution of the offender. 2 *Burn's Justice*, 657.

If the hue and cry be upon a robbery, burglary, manslaughter, or other felony committed, but the person that did the fact

is neither known nor describable by person, clothes, or the like, yet such a hue and cry is good and must be pursued, though no person certain be named or described. Therefore, in such a case, all that can be done is, for those that pursue the hue and cry, to take such persons as they have probable cause to suspect; as, for instance, such persons as are vagrants, or such suspicious persons as come late into their inn or lodgings and give no reasonable account where they have been, and the like. 2 *Hale*, 103.

If the person pursued by hue and cry be in a house, and the doors are shut and refused to be opened on demand of the constable and notification of his business, he may break open the doors, and this he may do in any case where he may arrest, though it be only a suspicion of felony; for it is for the people, and, therefore, a virtual *non omittas* is in the case. 2 *Hale*, 120.

And, upon hue and cry levied against any person, or where any hue and cry comes to a constable, whether the person be certain or uncertain, the constable may search suspected places for the apprehending of the felons. 2 *Hale*, 103. But, though he may search suspected places or houses, yet his entry must be by the doors, being open, for he cannot break open doors barely to search, unless the person against whom the hue and cry is levied be there, and then, it is true, he may. Therefore, in case of such a search, the breaking open the doors is at his peril; namely, justifiable, if he be there; not justifiable, if he be not there. But it must be always remembered that, in case of breaking open a door, there must be first a notice given to them within of his business, and a demand of entrance, and a refusal, before the doors can be broken. 2 *Hawk.*, 86. 2 *Burn's Justice*, 651.

And it seems that, where a felon is pursued, if he cannot be otherwise taken, he may be killed, and the necessity excuseth the constable. But if any of the pursuers be killed by the party flying, this will be murder. 2 *Hale*, 100. *Foster*, 271.

It is clear (Mr. Chitty says) that, when once hue and cry is commenced, those who join will be protected, even though it should ultimately appear that no felony has been committed; and the reasons for this are evident, because the constable cannot examine on oath as to the truth of the statement, and the nature of the proceeding requires the utmost promptitude, because officers are punishable if they neglect to observe it, and because he who, without cause, set it on foot, is punishable by fine and imprisonment for the disturbance he has occasioned. 1 *Chit. Crim. Law*, 29. And so it is if a person raise hue and cry upon a person that is innocent. Those that pursue the hue and cry may justify the imprisonment of that innocent person, and the raiser is punishable. 2 *Hale*, 103. 2 *Burn's Justice*, 653.

Arrest upon hue and cry differs from arrest upon mere

suspicion. In the latter case, it is necessary to aver, in justifying, that a crime was committed, and that fact may be put in issue; whereas, in the former case, no such allegation is necessary, nor is it even stated in pleading. 1 *Chit. Crim. Law*, 29. 2 *Hale*, 101.

In short, this proceeding arms all persons with the same authority as a warrant gives to the party to whom it is directed. They are not answerable for the propriety of the cry itself, but only for the regularity of their own conduct when acting under it. 1 *Chit. Crim. Law*, 29.

CHAPTER V.

OF THE EXAMINATION.

We have seen that it is the duty of the officer making the arrest to bring the party accused, within a reasonable time after the arrest, before the proper magistrate, that the case may be examined and the party, after due investigation, either discharged, bailed, or committed. It then becomes the duty of the justice to take and complete the examination of all concerned, and to discharge, bail, or commit the prisoner, as soon as the nature of the case will permit; but he is allowed a reasonable time for this purpose before he makes his final decision. 1 *Chit. Crim. Law*, 73.

If, by some reasonable occasion, the justice cannot, at the return of the warrant, take examination, he may, by word of mouth, command the constable, or other person, to detain in custody the prisoner till the next day, and then to bring him before the justice for further examination. And this detainer is justifiable by the constable or any other person, without showing the particular cause for which he was to be examined, or any warrant in writing. 1 *Hale*, 585. It is usual, however, when the party is detained for examination or re-examination till another day, to make out a written warrant for that purpose, which need not state the crime of which the party is accused. 1 *Chit. Crim. Law*, 73.

The examination of the party must be had within a reasonable time, 1 *Chit. Crim. Law*, 73, and the detainer must be no longer than necessary for such purpose, for which it seems to have been formerly supposed that the space of three days is a reasonable time. 1 *Burn's Justice*, 556. Lord Hale says

that the time of detainer must be reasonable, but adds that a justice cannot justify the detainer of a person sixteen or eighteen days in order to an examination. 1 *Hale*, 585. It is said to be the practice in England, at the present day, to commit from three days to three days by written mittimus, though, when the prisoner is remanded for a single day, it may be done by parol. 1 *Chit. Crim. Law*, 74. But there appears to be no precise limitation of the time, which must depend on the circumstances of each particular case; and, in the practice of the best regulated police offices, there are many instances of prisoners being detained much more than twenty days between their first being brought before a justice and their commitment for their trial, and being brought up for examination several different days during the interval. 1 *Chit. Crim. Law*, 73. There is no limitation as to the time within which the examination shall be had, prescribed by the statute of this state.

Mr. Chitty says, It seems more reasonable that the time for the full investigation of the case and final decision of the magistrate should depend on the circumstances of each case, than that he should be restricted to any particular time, as a general rule; for either the prisoner or the accuser may be unable to bring forward his evidence immediately, and the compelling the magistrate to discharge or commit within any limited time might be prejudicial to the purposes of justice. 1 *Chit. Crim. Law*, 74.

It has been said that the magistrate ought not to detain the party in prison in his own house, but to send him to the common jail of the county; for, otherwise, when the justices come to deliver the jail, he is not in the jail and may not be delivered, and so shall lie longer than is reasonable. *Cro. Eliz.*, 830. This reason seems to be unsatisfactory, for it is presumed that the magistrate will complete the examination as soon as the circumstances of the case and his duty will permit. If this is done before the judge of the circuit comes to deliver the jail, and the justice orders the prisoner to be commited for trial, he will, in that case, as a matter of course, commit him to the county jail, where the judge of the circuit, who comes to deliver it, will find him. If the examination cannot be completed before the judge comes for that purpose, the magistrate need not be compelled to proceed in the examination on that account, before his duty and the circumstances of the prisoner require it. And no other inconvenience can result from allowing the magistrate a reasonable time to complete his examination, than that the prisoner will be held to appear and answer, at a subsequent term of the court, in case the magistrate finally decides not to discharge him. And there may be cases in which a magistrate would be extremely unwilling to commit the party accused to the county jail during the interval of his examination, when he might be kept in safe cus-

tody, either in his own house or elsewhere. *Davis' Justice*, 57. For these reasons, it is probable that the rule has been laid down that, because it may be unreasonable to take the examination presently, or, possibly, it may take longer time, the prisoner may be continued in the custody of the officer, or may be detained in the justice's house, or committed to some near, safe place of custody till the final examination can be taken or completed. 2 *Hale*, 120. 1 *Chit. Crim. Law*, 74.

When the examination takes place before a justice residing in the vicinity of the county jail, it is convenient, and would, perhaps, be proper, that the prisoner should be committed to the county jail, when the examination cannot be taken or completed immediately; but it seems that, when the jail is at an inconvenient distance from the place of examination, the prisoner may be ordered into, and kept in the custody of, the officer in any other safe and convenient place, and this appears to be the usual practice. And, after the magistrate has determined on committing, he may verbally authorize the officer to detain the prisoner till he can make out the mittimus. 2 *Hale*, 122.

Upon the arrest of any person or persons charged with having committed any criminal offence in this state, being brought before any judge or justice of the peace, before he shall commit such prisoner to jail, admit to bail, or discharge him or her from custody, he shall inquire into the truth or probability of the charge exhibited against such prisoner or prisoners, by the oath of all witnesses attending, and shall, upon consideration of the facts and circumstances then proved, either commit such person or persons so charged, to jail, admit him, or her, or them to bail, or discharge him, her, or them from custody. And, in all cases where the charge is for sodomy, rape, arson, burglary, robbery, forgery, or counterfeiting, it shall be the duty of any justice of the peace, whenever any person or persons shall be brought before him, for the same or either of them, to associate with himself some neighboring justice of the peace previous to the examination of the witnesses, and they two shall have power to bail such prisoner or prisoners, or commit him, her, or them to jail, in case no good and sufficient bail is offered, or discharge the prisoner or prisoners, according to the proof that is adduced, and the law arising thereon. *Gale's Stat.*, 238.

The justice of the peace having authority to examine into the nature and circumstances of a criminal charge against an offender, has, also, a power as incident to his authority, to bring before him all persons who appear, from the oath of the complainant, or from the magistrate's own knowledge, to be material witnesses for the prosecution, and for this purpose may issue his warrant directed to a proper officer, requiring him to cause such witnesses to come before him and give evidence. *Dalt. Justice*, 542. If a witness refuse to attend, he

may be brought by the officer before the magistrate. 1 *Chit. Crim. Law*, 76.

It appears that, formerly, by the common law, if a felony is committed and one is brought before a justice upon suspicion thereof, and the justice finds, upon examination, that the prisoner is not guilty, yet the justice shall not discharge him, but he must either be bailed or committed; for it is not fit that a man once arrested and charged with felony or suspicion thereof, should be delivered upon any man's discretion, without farther trial. 1 *Burn's Justice*, 556. And, upon preliminary examinations upon charges of indictable felonies or misdemeanors, it seems that it was not customary to allow the accused the assistance of counsel, and, although it was sometimes allowed, it could not be claimed as of right, 10 *B. & Cres.*, 237, for the reason that it might impede the course of justice to allow counsel to attend and make objections. The reasons assigned for refusing a party accused of a crime the assistance of counsel, and for requiring the justice to bail or commit the prisoner although it may appear that he is not guilty of the offence charged, were probably deemed sufficient at the time those rules were adopted; yet, in England, they seem now to be very much questioned. Under these rules, very little discretion was allowed to a magistrate, and, however unfounded might have been the complaint, and however unjust and oppressive the prosecution might appear to the magistrate, he had no discretion to discharge, but must bail or commit the prisoner. And, as counsel was not allowed to any prisoner accused of a crime, so neither was he allowed to exculpate himself by the testimony of witnesses. And the same rules seem to have been observed upon the trial till the time of Mary I., who, when she appointed Sir Richard Morgan chief justice of the common pleas, enjoined him that, notwithstanding the old error which did not admit any witness to speak or any other matter to be heard in favor of the adversary, her majesty being party, her highness' pleasure was, that whatsoever could be brought in favor of the subject should be admitted to be heard, and, moreover, that the justices should not pursuade themselves to sit in judgment otherwise for her highness than for her subject. And in general the courts grew so heartily ashamed of a doctrine so unreasonable and oppressive, that a practice was gradually introduced of examining witnesses for the prisoner, but not upon oath, the consequence of which still was that the jury gave less credit to the prisoner's evidence than to that produced by the crown. Sir Edward Coke protests very strongly against this tyranical practice, declaring that he never read in any act of parliament, or bookcase, or record, that, in criminal cases, the party accused should not have witnesses sworn for him, and, therefore, there was not so much as a spark of right against it. And it is now provided by statute that all witnesses for the prisoner should

be examined upon oath in like manner as the witnesses against him. 4 *Bl. Com.*, 360. This modern rule, allowing to prisoners upon trial the right of introducing the testimony of witnesses upon oath, seems to be extended to and adopted in practice in examinations before justices of the peace. 1 *Burn's Justice*, 552. Mr. Chitty says, that it should seem that, upon the reasonable request of the defendant, the magistrate has a similar power to bring before him any witnesses who may be able to give material evidence in behalf of the prisoner that he has to require the attendance of witnesses on the part of the prosecution. 1 *Chit. Crim. Law*, 77.

It seemeth just and right, the justice of the peace who takes information against a felon or person suspected of felony, should take and certify as well such information, proof, and evidence as goeth to the acquittal or clearing of the prisoner, as such as makes against him. *Dalt. Justice*, 545. Though formerly his witnesses could not be examined upon oath, they are now placed on a footing with those whom the prosecutor adduces. 1 *Chit. Crim. Law*, 79.

By the constitution of this state, it is declared "That in all criminal prosecutions, the accused hath a right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his favor." *Const., Art. VIII. Sec.* 9.

The magistrate before whom any person shall be brought charged with any criminal offence, shall inquire into the truth or probability of the charge exhibited against such prisoner by the oath of all witnesses attending, and shall, upon consideration of the facts then proved, either discharge, bail, or commit him to jail; and, in cases requiring the presence of two justices to take the examination, they shall have power to discharge, bail, or commit, in case no good and sufficient bail is offered, according to the proof that is adduced, and the law arising thereon. *Gale's Stat.*, 238.

And it is said that, if there be an express charge of felony, on oath, against the prisoner, though his guilt appear doubtful, the justice cannot discharge him, but must bail or commit, according to circumstances; and that, if a person be killed by another, though it be by misadventure or in self-defence, which is not felony but excusable homicide, yet the justice ought not to discharge him, for he must undergo his trial, and, therefore, he must be committed or bailed. 1. *Chit. Crim. Law*, 89. 2 *Hale*, 121. 1 *Burn's Justice*, 379.

The discretion conferred upon justices of the peace by the constitution and laws of this state, in cases of examinations for criminal offences, is much greater than was allowed to them by the common law, and, when properly exercised, secures to every individual a sure protection against oppression, and malicious and groundless prosecutions.

If, upon the examination of the whole matter, it manifestly appears that either no such crime was committed by any person, or that the suspicion entertained of the prisoner is groundless, it is lawful for the justice to discharge him without even requiring bail. 4 *Bl. Com.*, 296. And a magistrate is clearly bound, in the exercise of a sound discretion, not to commit any one unless a *prima facie* case is made out against him by witnesses entitled to a reasonable degree of credit. 1 *Chit. Crim. Law*, 89.

But, while justices of the peace ought not to require the accused to give bail or commit for the want thereof, where the evidence produced against him is unsatisfactory and insufficient to raise a reasonable presumption of the guilt of the accused of the crime charged; yet, on the other hand, they ought not to be too ready to discharge, for it is not supposed that so full an investigation can often be had, in these preliminary examinations, as upon a trial.

In England, the examination of the accuser, witnesses, and prisoner, in cases of felony and manslaughter, is principally regulated by statutes; 1 *Chit. Crim. Law*, 80; and, in taking the examination of the prisoners under the authority of those statutes, the magistrate is required to attend, with the most scrupulous exactness, to their directions; for, if the examinations are informally taken, they will not be admissable, or, at least, will not receive any additional sanction for those statutes, and which they would otherwise confer. 1 *Chit. Crim. Law*, 77. The provisions of these statutes have not been adopted in this state, except on the examination of fugitives from justice, and it is not usual in practice for justices to take the examination in writing. Although taken in writing, they could not be given in evidence on the trial of an indictment which might subsequently be found by a grand jury. 1 *Chit. Crim. Law*, 80.

The complainant and his witnesses must be ready to confront the accused on the examination, in whose presence the evidence must always be given, in order that he may have the advantage of cross examining the witnesses and contradicting their testimony. 1 *Chit. Crim. Law*, 79. 4 *Bl. Com.*, 360. 3 *Bl. Com.*, 373.

It is the usual course, when the prisoner is brought before the justice, to state to him the substance of the accusation and to read to him the warrant, or so much thereof as is necessary to inform him of the crime for which he has been arrested, and ask him whether he is guilty or not guilty. It has been doubted, however, whether the justice ought to require the prisoner to make any answer to the charge, for the reason that he can, regularly, do no more than examine the complainant and the witnesses produced on the part of the prosecution as well as by the prisoner, and thereupon discharge, bail, or commit, as he may determine as to the truth or probability of

the guilt of the prisoner. There are no decisions or authorities recollected, however, indicating which would be the more proper course.

In adopting the practice of asking the prisoner whether he is guilty or not guilty, the justice ought to caution him that he is not bound either to accuse himself or confess his guilt, and that any confession or admission of that nature may be produced in evidence against him on the trial. 1 *Chit. Crim. Law*, 85. At all events, no improper influence, either by threat, promise, or misrepresentation, ought to be employed; for, however slight the inducement may have been, a confession so obtained cannot be received in evidence, on account of the uncertainty and doubt whether it was made rather from a motive of fear or interest than from a sense of guilt. 2 *Hale*, 284. 4 *Bl. Com.*, 357. To say that it will be better for him if he will confess, or worse if he will not, is sufficient to exclude the consequent declaration by the prisoner; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and, therefore, excludes the declaration, if any degree of influence has been exerted. And, when a confession has once been induced, by such means, all subsequent admissions of the same, or of the like facts, must be rejected, if they have resulted from the same influence. 2 *Stark. Ev.*, 27. 15 *Wend. Rep.*, 231. And it is the duty of the magistrate to prevent, if possible, the prosecutor and the officer who may have the prisoner in custody, from any attempts to obtain a confession of his guilt, for they are, sometimes, very officious in this way. The caution and delicacy usually observed by justices of the peace, in these cases, is highly creditable. Yet this reserved practice may be extended beyond the bounds which the strictest regard to the rights of the prisoner requires. It would seem that, when a prisoner is brought before a magistrate upon a criminal charge, of whatever nature it may be, there can be no reasonable objection in asking him whether he is guilty or not guilty. *Davis' Justice*, 72.

The justice should, also, be upon his guard against confessions uttered by collusion, as was the case where two brothers committed a robbery and fled. A younger brother, who was innocent, in order to favor their escape, when examined, dropped hints amounting to a constructive admission of his guilt. On this he was committed to prison, and the pursuit of the brothers discontinued. On his trial he proved an *alibi*, and obtained an easy acquittal, and, in the mean time, the actual felons escaped with their plunder. 1 *Chit. Crim. Law*, 85.

It is, perhaps, proper to consider the duty of justices of the peace in obtaining the evidence of accomplices.

The engagement of a justice to an accomplice that, if he will give his evidence, he may expect favor, is merely a per-

sonal engagement, on his part, that he will recommend the accomplice to mercy; for a justice has no authority to promise him any favor or to tell him that he shall be a witness against others. A justice has no authority to select whom he pleases to pardon or prosecute, and a prosecutor has even less power, or, rather, pretence to select, than a justice of the peace. It is, merely, an equitable claim upon the government for a pardon from the justice's promise of an indemnity, upon condition of a full and candid disclosure. Yet, however faithfully the accomplice may comply with the condition, he cannot avail himself of the promise or inducements of the justice upon his trial. 1 *Chit. Crim. Law*, 83. The accomplice, therefore, may be deceived, and drawn in under the color and pretence of judicial authority and power of protection, to disclose what he is not bound to discover, and thus make himself the deluded instrument of his own conviction. *Cowp.*, 331. However, in present practice, where accomplices make a full and fair confession of the whole truth, and are, in consequence, admitted to give evidence for the people, if they afterwards give their testimony fairly and openly, although they are not entitled to pardon, the usage, lenity, and practice of the court is, to stay the prosecution against them. *Leach*, 140. *Cowp.*, 339.

The justice of the peace should bear in mind, that the testimony of these accomplices must, from its very nature, be regarded with great jealousy and suspicion, and that their testimony, unless materially corroborated by other evidence, is of very little weight or value in the prosecution. 1 *Hale*, 305. In practice, it is usual to direct the jury to acquit the prisoner where the evidence of an accomplice stands uncorroborated by material circumstances; but, it is said this is a matter resting entirely in the discretion of the court. 2 *Stark. Ev.*, 12.

The witnesses, especially if they appear unwilling, should be examined separately, and no one who has already passed his examination should be permitted, if it be possible to avoid it, to inform any other, who has yet to undergo that process, to what particulars his discoveries have extended. By this means, a conspiracy to overwhelm a prisoner will, probably, be detected, and undue motives to favor him, from interest or pity, will be prevented from obstructing the progress of justice. 1 *Chit. Crim. Law*, 80.

The court may indulge a prisoner in examining the witnesses apart, but he cannot demand it of right. 1 *Burn's Justice*, 553.

CHAPTER VI.

1. OF THE DISCHARGE; 2 OF BAIL AND RECOGNIZANCE; 3. OF THE MITTIMUS; 4. OF RECOGNIZANCE TO GIVE EVIDENCE; 5. OF BAIL AFTER THE COMMITMENT.

1. *Of the discharge.*

THE examination of a prisoner, when brought before a justice of the peace, charged with having committed a criminal offence, was formerly an *ex parte* inquiry, and the prisoner was not allowed the benefit of counsel or the privilege of introducing any exculpatory evidence. And, if an express charge of felony, on oath, against the prisoner, was made, though his guilt appeared doubtful, yet the justice could not wholly discharge him, but must have bailed or committed him. 2 *Hale*, 121. And, if a person was brought before a justice charged with having committed a felony, or upon suspicion thereof, though it appeared to the justice that the prisoner was not guilty, it seems to have been the duty of the justice to commit him to prison, or, at least, to join with some other in the bailment of him, to the end the party may be discharged by a lawful trial. *Dalt. Justice*, 540. This rule, however, has been modified, and the justice is not required to commit any one unless a *prima facie* case is made out against him by witnesses entitled to a reasonable degree of credit. 1 *Barn. & Cres.*, 50.

Under the statutes of this state, this proceeding, in some measure, seems to partake of the nature of a trial. It appears to be clearly the duty of the justice, when the prisoner is brought before him, to examine the complainant and the witnesses in support of the prosecution and the prisoner's witnesses, and to determine as to the truth or probability of the guilt of the accused. A discretion is confided to him, after hearing the evidence and upon consideration of the facts and circumstances, to bail, commit, or discharge the prisoner from custody; and, where the charge is for sodomy, rape, arson, burglary, robbery, forgery, or counterfeiting, the two justices authorized to take the examination have power to bail, commit, or discharge the prisoner, according to the proof that is adduced and the law arising thereon. *Gale's Stat.*, 238.

It would not, however, be necessary that the guilt of the accused should be proved as fully and conclusively upon an examination before a justice of the peace as it would be upon the traverse of an indictment before a jury. But the justice should be satisfied that there is a reasonable presumption that

the prisoner would be convicted upon trial. It seems to be the intention of the statute to secure to persons who may be arrested upon a charge of having committed a criminal offence, or upon suspicion thereof, an investigation into the truth or probability of the grounds of the charge, so that the accused may be discharged, if it should appear there were no sufficient grounds for his arrest.

2. *Of bail and recognizance.*

The justice having heard the examination and ascertained that the prisoner is not entitled to be discharged, if the offence charged is bailable and sureties are offered, he is then to admit him to bail, if he shall find that they are sufficient.

Bail is a delivery or bailment of a person to his sureties, upon their giving, together with himself, sufficient security for his appearance to answer the charge against him, he being supposed to continue in their friendly custody instead of going to jail. 4 *Bl. Com.*, 297. *Dall. Justice*, 549.

By the ancient common law of England, in all cases of felony, if the party accused could find sufficient sureties, he was not to be committed to jail, till murder was excepted by statute, so that persons might be admitted to bail before conviction almost in every case. By other statutes, the power of justices of the peace to bail in cases of treason, and several instances of aggravated felony, is taken away. 4 *Bl. Com.*, 298. 1 *Chit. Crim. Law*, 95. For other offences of a dubious nature, it seems to be in the discretion of the justice whether to bail or not. But, for the smaller offences, the party accused must be bailed upon offering sufficient surety. 4 *Bl. Com.*, 299.

By Art. VIII., Sec. 13 of the constitution of this state, it is declared "That all persons shall be bailed by sufficient sureties, unless for capital offences, where the proof is evident or the presumption great."

A commitment being only for the safe custody of the accused, wherever bail will answer the same intention it ought to be taken.

No justice of the peace shall admit to bail any person or persons charged with treason, murder, or any offence punishable with death. *Gale's Stat.*, 238.

The circuit courts, or any judge thereof, in vacation, may bail for any crime whatsoever, be it treason, murder, or any other offence, according to the circumstances of the case. To allow bail to be taken commonly for such enormous crimes, would greatly tend to elude the public justice; and yet there are cases, though they rarely happen, in which it would be hard and unjust to confine a man in prison, though accused of the highest offence. 4 *Bl. Com.*, 299. *Dall. Justice*, 553. However, by the constitution of this state, a

person charged with a capital offence must be bailed upon offering sufficient sureties, unless the proof of his guilt is evident or the presumption great.

By the statute it is provided that any justice of the peace before whom any person shall be brought, charged with any criminal offence, except a capital offence, shall, upon consideration of the facts and circumstances then proved, either commit such person to jail, admit him to bail, or discharge him from custody. In cases where the charge is for sodomy, rape, arson, burglary, robbery, forgery, or counterfeiting, requiring the presence of two justices of the peace to take the examination, they two shall have the power to bail the prisoner, commit him to jail, or discharge him from custody. *Gale's Stat.*, 238.

If a justice of the peace should refuse to bail any person bailable, it is an offence against his liberty by the common law, and an action lies at the suit of the party imprisoned, and an indictment may be supported. 2 *Hawk.*, 90. 1 *Burn's Justice*, 151. And, if he detains a prisoner who is bailable after he has offered sufficient securities, he may be fined. *Dalt. Justice*, 550.

Excessive bail ought not to be required, though what bail shall be called excessive must be left, in a great measure, to the justice to determine on considering the circumstances of the case. Care should be taken by the justice, in cases where the prisoner should be bailed, that he does not, under pretence of demanding sufficient surety, make so excessive a requisition as, in effect, to amount to a denial of bail. On the other hand, taking insufficient bail subjects the justice offending to punishment; but if the prisoner, who is bailed by insufficient sureties, actually appears according to the condition of the recognizance, it seems that he who admitted him to bail will be excused, as the end of the law is answered by his appearance. 4 *Bl. Com.*, 297. But, if such insufficient sureties were taken corruptly, the justice would continue liable to an indictment. 1 *Chit. Crim. Law*, 102.

It is not the duty of the justice to demand bail, but the prisoner is bound to tender it, otherwise the justice may commit him. 2 *Hale*, 123. He that is bailed is taken, or kept, out of jail and delivered (as it were) into the hands of his sureties, who are reputed his guardians, and who may keep him with them and imprison him. And, if the sureties do, at any time or in any case, doubt that their prisoner or the party by them bailed will fly, they may take him and bring him before any justice of the peace; and, upon their prayer, the justice may and ought to discharge such sureties, and commit the party to jail, except he shall find other sureties.

If a prisoner be bailed by insufficient persons, the justice of the peace, *ex officio*, may cause him to find better sureties, and may commit him till he shall do so. *Dalt. Justice*, 550.

As there is great responsibility upon the justice in these cases, it seems that he may, in order to ascertain to his satisfaction the ability of the sureties, examine them upon oath as to the value of their property. 2 *Hale*, 125. This seems to be customary in the higher courts, and, indeed, is every day's practice. And that which the higher courts do may be a good rule for others. *Dalt. Justice*, 550. 1 *Chit. Crim. Law*, 99.

It is said that the sureties should at least be two men, each of whom shall be of sufficient ability to answer the sum in which he is bound. 1. *Chit. Crim. Law*, 99. It appears, however, that a recognizance entered into by a prisoner and one surety would be binding. *Breese's Rep.*, 257. This rule, however, seems to have been adopted for the benefit of the justice, and, therefore, though he may insist upon two sureties, yet he may take a recognizance with one surety only. 2. *Saund.*, 61, c. But, when the justice accepts one surety only, there ought to be no doubt of the sufficiency of his property to answer the penalty of the recognizance.

The ability of the prisoner, and the nature of the crime, should always be taken into consideration in determining upon the sufficiency of the sureties, and the sum in which they are held to recognize. Not that security for a trifling sum should be taken because the prisoner is poor, but, if he is rich, a larger sum may reasonably be required than in other cases.

The recognizance of the prisoner with sureties, is an obligation or acknowledgment entered into before some court of record or magistrate duly authorized, of a former debt upon record with a condition to do some particular act; as to appear on the first day of the next circuit court, to keep the peace, or the like, upon the performance of which the recognizance shall be void. This being certified to, or taken by the officer of some court, is witnessed only by the record of that court, and not by the party's seal; so that it is not, in strict propriety, a deed, though the effects of it are greater than a common obligation. 2 *Bl. Com.*, 341. 4 *Burn's Justice*, 34. In these recognizances, the principal is bound in double the sum of the sureties, and the usual number of sureties is two.

A recognizance has many of the attributes of a judgment, and the lands, tenements, and hereditaments of the cognizor, in his hands at the time of his acknowledgment thereof, or after, are bound by it, into whose hands soever they come. *Jac. Law. Dic., tit. Recognizance.* 2 *Bl. Com.*, 341. It does not, however, strictly speaking, become a recognizance or debt of record until it is filed or recorded in the court in which it is returnable. 2 *Saund.*, 68. 4 *Wend. Rep.*, 387.

By the 5th sec. of "An act to regulate the apprehension of offenders, and for other purposes," it is enacted that "All recognizances that have any relation to criminal matters, shall be taken to the people of this state, shall be signed by the

person or persons entering into the same, be certified by the judge, justice of the peace, or other officer taking the same, and delivered to the clerk of the circuit court, on or before the day mentioned therein for the appearance of the witness or accused therein bound. Recognizances taken in courts of record need not be signed or certified as aforesaid." *Gale's Stat.*, 239.

By the 3d sec. of the same act, "All recognizances taken in pursuance of this section shall require the accused to appear at, and on the first day of the next circuit court, or if the court be then sitting, on some day of the term, to be therein designated."

When the principal cannot join in a recognizance, it should be taken of the bail only. 1 *Chit. Crim. Law*, 104. Infants cannot legally bind themselves by bond or recognizance; 2 *Hale*, 126; and a married woman cannot be bound by recognizance, because it is not capable of being estreated. 1 *Chit. Crim. Law*, 100. If a prisoner is in jail, it seems that a recognizance may be taken from the bail only. 2 *Hale*, 126.

It is said to be a general rule, that the defendant and his bail cannot be called upon their recognizance, except on the day on which he is bound to appear; if he is called on any other day, notice must be given of the intention. 1 *Chit. Crim. Law*, 106. The usual practice, however, is not in accordance with this rule. And, when the recognizance is that the accused shall appear and answer, he is not at liberty to depart after once making his appearance in court; he must remain till duly discharged. The bail are the jailers of his own choosing, and must secure his appearance as effectually, and put him as much under the power of the court, as if he had been in the custody of the proper officer. 10 *Wend. Rep.*, 433. 17 *Wend. Rep.*, 252.

But, where a strict compliance with the condition of the recognizance has become impossible, the non-performance will be excused. It is said that, if a man be bound by a recognizance, or bound with a condition that he shall appear at the term in such a court, and, before the day, the cognizor or obligor dieth, the recognizance or obligation is saved. And the reason assigned is, that the bond or recognizance is a thing in action and executory, whereof no advantage can be taken until there be a default in the obligor, and, therefore, in all cases when the condition of the bond or recognizance is possible at the time of making the condition, and, before the same can be performed, the condition becomes impossible, by the act of God, or of the law, or of the obligee, then the obligation is saved. 8 *Cowen's Rep.*, 279. 11 *Mod. Rep.*, 200.

When the principal stood bound by his recognizance to appear in court on the first day of the term, and his surety, excusing his non-appearance by reason of sickness, moved that his recognizance might be discharged, the attorney gener-ld

having orders and, being in court, consenting thereto: but Holt, Ch. J., said, notwithstanding such consent, the principal not appearing in person, the court could not discharge the recognizance, but said they could respite it till the next term, which was done accordingly. 4 *Burn's Justice*, 85.

If the principal make default in not appearing according to the condition of his recognizance and his default is entered of record, his recognizance thereby becomes forfeited and liable to be estreated; 4 *Burn's Justice*, 84. 1 *Chit. Crim. Law*, 106. 4 *Wend. Rep.*, 393; and, being estreated, the party and his sureties become absolute debtors to the people, and may be sued for the several sums in which they are respectively bound. 4 *Bl. Com.*, 253.

But, if a recognizance be estreated because not punctually complied with, yet, if the party appear and take his trial the next court, or otherwise performs what he was bound to by the recognizance, as the case shall be, he may compound for a very small matter, because the effect, though not the exact form, of the recognizance is complied with. 10 *Mod. Rep.*, 278. 1 *Burn's Justice*, 530.

At common law, it is said the judges of oyer and terminer are the proper judges whether recognizances ought to be estreated or spared; and that it is for the benefit of public justice that they should have such power, if, upon the circumstances of the case, they should see fit to exercise it. 4 *Burn's Justice*, 85. 10 *Mod. Rep.*, 278, 152. Even after default entered for not complying with the condition of the recognizance, it seems the judges had a discretionary power to order the amount of the recognizance to be collected or not. A recognizance being a debt of record, an action of debt would lie upon it.

If the conusee did not take out execution within a year and a day after the payment assigned in the recognizance, he was obliged, at common law, to commence an action of debt upon it; for the law presumes the debt was paid. But, by the statute of 13 Ed. I., the conusee may sue out a *scire facias* to revive the recognizance, and put it in execution, if the conusor cannot stay it by pleading such matters as the law judges sufficient for that end. 2 *Inst.*, 469. 2 *Saund.*, 71, b.

It appears, by the common law, to be the usual practice, after the recognizance has been estreated, that process issue for the collection of the amount in which the party is bound. *Dalt. Justice*, 394. *Jac. Law. Dic.*, *tit. Recognizance*. 1 *Burn's Justice*, 531.

By sec. 186 of the Crim. Code, it is provided that, "In all cases of bail, for the appearance of any person or persons charged with any criminal offence, the security or securities of such person or persons may, at any time before judgment is rendered upon *scire facias*, to show cause why execution should not issue against such security or securities, seize and

surrender such person or persons, charged as aforesaid, to the sheriff of the county wherein the recognizance shall be taken; and it shall be the duty of such sheriff, on such surrender and the delivery to him of a certified copy of the recognizance, by which such security or securities are bound to take such person or persons so charged as aforesaid, into custody, and by writing acknowledge such surrender, and thereupon the security or securities shall be discharged from any such recognizance, upon payment of all costs occasioned thereby." *Gale's Stat.*, 234.

The statute seems to contemplate that, before any process shall be issued for collecting the debt in the recognizance mentioned, a *scire facias* shall be issued, requiring the conusors to show cause why execution should not issue. And such appears to be the practice. *Breese's Rep.*, 257.

3. *Of the mittimus.*

Mittimus is a precept in writing, under the hand of a justice of the peace, directed to a constable, commanding him to convey the prisoner to the jailer; and to the jailer for the receiving and safe keeping of the prisoner until he is delivered by law.

When a person has been apprehended for an offence that is not bailable, and a *prima facie* case is made out against him and sustained by witnesses or evidence entitled to a reasonable degree of credit, or where the charge is for an offence which is bailable and he neglects to offer sufficient bail, he must be committed. 1 *Burn's Justice*, 379. 1 *Hale*, 583.

A justice who has power to examine a person accused of a crime, has, also, in general, as incident to his office, power to commit him. 1 *Chit. Crim. Law*, 107. And, by the statute of this state entitled "An act to regulate the apprehension of offenders, and for other purposes," sec. 3, the justice before whom the prisoner shall be brought, shall inquire into the truth or probability of the charge exhibited against him, and shall, upon consideration of the facts and circumstances then proved, either commit such person so charged to jail, admit him to bail, or discharge him from custody. And, in all cases where the charge is for sodomy, rape, arson, burglary, robbery, forgery, or counterfeiting, it shall be the duty of the justice before whom the prisoner shall be brought to associate with himself some neighboring justice, previous to examination of the witnesses, and they two shall have power to bail such prisoner, or commit him to jail, in case no good and sufficient bail is offered, or discharge the prisoner, according to the proof that is adduced, and the law arising thereon. *Gale's Stat.*, 238.

Though the mittimus need not be drawn with the same precision as an indictment, yet it is very important that it should

be framed with accuracy, or the party may, though prosecuted for a felony, be discharged out of custody, or, if he escape, the officer may not be punishable. 1 *Chit. Crim. Law*, 109.

The formal requisites of a mittimus may be considered under the following heads:

1. Every final commitment must be in writing under the hand of a justice, and must show the authority of the justice, and the time and place of making it. 2 *Hale*, 122. It need not be under seal. *Gale's Stat.*, 240. A justice may, by parol, order a party to be detained a reasonable time, until he can draw out a formal commitment. 2 *Hale*, 122. It must be in writing, and it is said that, although advisable, it is not absolutely necessary, to state that the mittimus was made by the justice in that character; for, though his authority do not appear at the beginning of the mittimus, it may be supplied by averment. 2 *Hawk.*, 119. 2 *Hale*, 122.

2. The mittimus may be made either in the name of the people or of the justice awarding it, but the latter is the most usual. 1 *Chit. Crim. Law*, 109. By the constitution, however, it appears that the warrant of commitment ought to run in the name of the people of the state of Illinois.

3. The mittimus should be directed to a constable and to the keeper of the proper jail, commanding the constable to convey the prisoner into the custody of the keeper, and commanding the keeper to receive and keep him. 1 *Chit. Crim. Law*, 110.

4. The prisoner should be described by his name and surname, if known, and if not known, then it may suffice to describe the person by his age, stature, complexion, color of hair, and the like, and to add that he refuses to tell his name. 1 *Hale*, 577.

5. It is said that it is safe, but not necessary, to set forth that the party is charged upon oath. 2 *Hawk.*, 120. 1 *Burn's Justice*, 381. It has been held not to be necessary, because a commitment may be upon view, and there an oath is not requisite. And it is not necessary to state any part of the evidence adduced before the magistrate, or to show the grounds on which he has thought fit to commit. 1 *Chit. Crim. Law*, 110. It would, however, be the better way to state that the party has been charged upon oath, except when committed upon view. 6 *Term Rep.*, 509.

6. But it is necesary to set forth the particular species of crime alleged against the party, with reasonable certainty. 1 *Chit. Crim. Law*, 110. The mittimus ought to contain the certainty of the cause, and, therefore, if it be for felony, it ought not to be generally for felony, but it must contain the special nature of the felony, briefly, as, *for felony for the death of J. S.;* or, *for burglary in breaking the house of E. F.;* and the reason is, that it may appear to the court or judge, upon *habeas corpus*, whether it be felony or not. 2 *Hale*, 122.

And it is said that a mittimus to answer such things as shall be objected against the prisoner, is utterly void and against law. 1 *Burn's Justice*, 381. 2 *Inst.*, 591.

Yet, it has been said that there are precedents of commitment for felony in general, in good authors, without stating the specific accusation. 1 *Chit. Crim. Law*, 111.

In this state, it may not become necessary to reconcile the different opinions of the various authors upon this subject, or to determine which is the best supported and the most reasonable. By the 10th sec. of "An act to regulate the apprehension of offenders, and for other purposes," it is provided "That no person shall be discharged on *habeas corpus* from his imprisonment merely by reason of any defect or legal precision, or want of technical form in the warrant of commitment, but the court or judges awarding such *habeas corpus* shall, in all such cases, proceed and determine as if the mittimus had all legal and technical form: *Provided*, sufficient appear on the face of the mittimus to ascertain for what crime or offence such prisoner or prisoners shall have been committed. *Gale's Stat.* 240. It appears from this statute that, unless the warrant or mittimus contains the cause of commitment, expressed with sufficient certainty to enable the court or judge to determine for what crime or offence the prisoner was detained, he must be discharged. And, by the *habeas corpus* act, if it appear that the prisoner is in custody by virtue of process from any court legally constituted, he can be discharged, where the process is defective in some substantial form required by law. And no person thus discharged shall be again imprisoned, restrained, or kept in custody for the same cause, unless he be afterwards indicted for the same offence, or unless by the legal order or process of the court wherein he is bound, by recognizance, to appear; but it shall not be deemed to be the same cause, generally, whenever the discharge has been ordered on account of the non-observance of any of the forms required by law, and the party may be a second time imprisoned, if the cause be legal and the forms required by law be observed. According to the law of England, it is the duty of the justice, on the examination, to take the testimony of the complainant and witnesses in writing; and, by the authorities which hold that a mittimus need not contain the nature of the offence, it appears that, if the deposition returned to the court disclose the body of the offence, the prisoner will not be bailed, but remanded. 1 *Chit. Crim. Law*, 113. We have no such practice as taking and returning depositions. In all examinations before a justice, the testimony is given *viva voce* by the witness, and in the presence of the party accused. In the inquiry upon *habeas corpus*, the court or judge proceeds, in a summary way, to settle the facts by hearing the testimony and the arguments, as well of all the parties interested civilly, if any there be, as of the prisoner, and the person who holds

him in custody, and is required to dispose of the prisoner as the case may require. If it appear that the prisoner is in custody by virtue of process from any court legally constituted, he can be discharged only for some of the following causes:

1. Where the court has exceeded the limits of its jurisdiction, either as to the matter, place, sum, or person.

2. Where, though the original imprisonment was lawful, yet, by some act, omission, or event which has subsequently taken place, the party has become entitled to his discharge.

3. Where the process is defective in some substantial form required by law.

4. Where the process, though in proper form, has been issued in a case or under circumstances where the law does not allow process, or orders for imprisonment, or arrest, to issue.

5. Where, although in proper form, the process has been issued or executed by a person either unauthorized to issue or execute the same, or where the person having the custody of the prisoner under such process is not the person empowered by law to detain him.

6. Where the process appears to have been obtained by false pretence or bribery.

7. Where there is no general law, nor any judgment, order, or decree of a court to authorise the process, if in a civil suit, nor any conviction, if in a criminal proceeding.

No court or judge, on the return of a *habeas corpus*, shall, in any other matter, inquire into the legality or justice of a judgment or decree of a court legally constituted.

In all cases where the imprisonment is for a criminal or supposed criminal matter, if it shall appear to the said court or judge that there is sufficient legal cause for the commitment of the prisoner, although, such commitment may have been informally made, or without due authority, or the process may have been executed by a person not duly authorized, the court or judge shall make a new commitment, in proper form, and directed to the proper officer, or admit the party to bail, if the case be bailable. *Gale's Stat.*, 323.

It is further provided by statute that, whenever a *habeas corpus* shall be issued to bring up the body of any prisoner, committed because he is unable to procure bail, or because the offence is not bailable, it shall be the duty of the court or judge, unless it shall be deemed wholly unnecessary and useless, to examine the witnesses written on the warrant of commitment, and such as the prisoner may request, touching any offence mentioned in the warrant of commitment, whether the said offence be technically set out in said commitment or not; and, upon the hearing, said court or judge may either recommit, bail, or discharge the prisoner, according to the facts of the case. *Gale's Stat.*, 242.

It seems clear, from the foregoing provisions, that the of-

fence for which the prisoner is committed ought to be substantially described in the mittimus.

As a person charged with having committed a criminal offence in this state may be admitted to bail, except for capital crimes, although, he may have been committed for the want thereof, it is necessary that the mittimus should show the cause of the commitment, so that it may appear whether such prisoner is bailable or not. For, where a prisoner is committed, in a bailable case, for the want of sureties, by a mittimus not showing any cause, it has been said that, if any other justice shall bail him, not knowing the cause, he shall be fined. *Dalt. Justice*, 53, 552. Because the justices who may be called upon to take and certify a recognizance for the discharge of a prisoner, may inform themselves of the cause of the commitment, by reference to the justice who committed him; or, because the prisoner may resort to the writ of *habeas corpus*, if improperly detained, and obtain his discharge, appear to be reasons unsatisfactory and insufficient for sustaining a mittimus which does not express, with sufficient certainty, the cause of commitment. It is not perceived why the accused should be subjected to a protracted imprisonment, on account of the negligence of the justice in not stating, in the mittimus, the cause of commitment, so that it may be seen whether the offence is bailable, or whether any offence has been committed.

When the facts of the case will warrant a commitment for felony, the mittimus should not be on suspicion of felony; for it is said by Lord Mansfield that, on such commitment, a party has a right to be bailed under the *habeas corpus* act, and that a person who facilitates the escape of a party so committed would not be indictable. 1 *Leach*, 98. 1 *Chit. Crim. Law*, 112. Under our statute, any person accused of having committed a criminal offence in this state, (except treason, murder, or any offence punishable with death,) has a right to be bailed, upon offering good and sufficient sureties, and it is not in the discretion of the justice whether to bail or not; but, if there be an express charge for treason, murder, or any offence punishable with death, or upon suspicion thereof, the justice of the peace has no power to bail. And, where any person is charged, upon oath or affirmation, with having committed a criminal offence in this state, and is brought before a justice, it is his duty to inquire into the truth and probability of the charge exhibited against the accused, and shall, upon consideration of the facts and circumstances then proved, either commit such person so charged to jail, admit him to bail, or discharge him from custody. *Gale's Stat.*, 238.

From this statute, it appears to be the duty of the justice, when he has determined not to discharge the prisoner, to commit him to jail, if the offence be of a capital nature, and, in all other cases, (unless he offers good and sufficient sureties,)

upon the charge exhibited against him, whether he be expressly charged with having committed the offence, or upon suspicion only.

It is not necessary, however, to allege, in the mittimus, that the offence was feloniously committed; and it is sufficient if enough appear upon the face of it to show that the charge was for a felony. 1 *Chit. Crim. Law*, 113.

A commitment ought not to be in the disjunctive. 1 *Chit. Crim. Law*, 112. An objection to the warrant of commitment, as running in the disjunctive, must prevail. 1 *Burn's Justice*, 382.

8. The mittimus should point out the place of imprisonment, and not merely direct that the party should be taken to prison; and the party ought to be committed to a common prison of the county in which the offence was committed and the warrant granted, though the prisoner may be pursued into, and taken in another county, or arrested upon a warrant running into any county of the state. 1 *Chit. Crim. Law*, 114, 108.

Yet, it is said, if a man do commit murder, steal goods, or do any other felony in one county and then fleeth into another county, and is there taken, and brought before a justice of the peace there, he shall, by the justice, be imprisoned in the jail in the county where he is taken, and, after, shall be removed by a writ of *habeas corpus* into the jail of the county where he committed the felony. *Dalt. Justice*, 534, 585. 1 *Burn's Justice*, 380. This, however, can only be done where the offender is not arrested upon a warrant issued in the county where the crime was committed. By the common law it is said that, in strictness, there ought to have been a fresh warrant in every fresh county, 4 *Bl. Com.*, 292, and the offender committed to the jail of the county where he was taken. *Dalt. Justice*, 585

It is not supposed that our statute, authorizing the justice issuing a warrant to make an order thereon authorizing a person, to be named in such warrant, to execute the same, and thereby giving him power to arrest the offender anywhere in the state and bring him before the justice issuing the warrant, or some other justice in the same county; or the statute authorizing any officer in the state having a warrant for the apprehension of an offender, to pursue him into an adjoining county, if he shall cross the line, was intended to do away the common law practice, but to afford additional means for apprehending and securing offenders.

9. The mittimus should have an apt conclusion; namely, to detain him "until he shall be delivered by due course of law." These words alone are proper, when the party is committed for an offence not bailable; but, when he is committed for want of sureties, for a bailable offence, it is usual to direct the jailer to keep the prisoner in his said custody for want of sureties, or

"until he shall be discharged by due course of law." But the most usual and comprehensive words are, "until he shall be discharged by due course of law." 2 *Hale*, 123. 1 *Chit. Crim. Law*, 114. But, if the conclusion be irregular, it doth not seem to make the mittimus void, but the law will reject that which is surplusage, and the rest shall stand. 1 *Hale*, 584.

No precise mode of introducing the statement of the offence appears material. The most usual forms are, "with feloniously assaulting," &c.; or "with having on," &c.; or "for unlawfully," &c.; or "with a misdemeanor, to wit, with having," &c.; or "with suspicion of having been guilty of," &c.; or "for that he, the said C. D., on," &c.; and then recite the offence as set out in the warrant of arrest. The last seems to be the more preferable form of introducing the statement of the crime. If the offence be against a statute, the description should close with the words "contrary to the form of the statute or statutes in such case made and provided."

The mittimus then proceeds with a direction to the jailer, "And you, the said keeper, are hereby required to receive the said C. D. into your custody in the said jail, and him there safely keep until he shall be discharged by due course of law;" or, if he be committed for a bailable offence, or for want of finding sureties, "for want of sureties, or until he shall be discharged by due course of law."

It is the duty of the jailer to receive the party; and, if he refuse, or unlawfully demand any thing for receiving him, it is an indictable offence. If the jailer will not receive him, it is said that the constable, or person who arrested him, may, in such case, keep the prisoner in his own house. *Dalt. Justice*, 586. The officer to whose custody he was committed on the mittimus may, in such case, keep the prisoner until the jailer can be compelled to receive him. But, in other cases, it seems that, regularly, no one can justify the detaining a prisoner in custody out of the common jail, unless there be some particular reason for so doing; as, if the party be so dangerously sick that it would apparently hazard his life to send him to jail, or unless there be evident danger of a rescous. 1 *Burn's Justice*, 384. 1 *Hawk.*, 118.

If the justice, acting within the scope of his jurisdiction, but taking an erroneous view of the effect of the evidence, should come to a wrong conclusion, and commit the defendant, and he should be afterwards discharged by the superior court on *habeas corpus*, yet he cannot, on that account, sue the justice. 1 *Chit. Crim. Law*, 116.

By statute, it is provided that "It shall be the duty of the judge or justice committing a person to jail, to endorse on the warrant of commitment, in bailable cases, in what sum bail ought to be taken." *Gale's Stat.*, 239.

And it is also provided, that it shall be the duty of the judge or justice of the peace who shall commit any offender to jail,

either because such offender is unable to procure bail for his appearance at court, or because the offence is not, by law, bailable, to write on the warrant of commitment the names and residence of the principal witnesses by whom the crime was proved before said judge or justice. *Gale's Stat.*, 242.

Any sheriff, or his deputy, any jailer or coroner, having custody of any prisoner committed on any civil or criminal process of any court or magistrate, who shall neglect to give such prisoner a copy of the process, order, or commitment by virtue of which he is imprisoned, within six hours after demand made by said prisoner, or any one on his behalf, shall forfeit five hundred dollars. *Gale's Stat.*, 327.

When the prisoner shall demand a copy of the warrant of commitment, the sheriff or jailer shall endorse on the copy the names of the witnessses written thereon. Any judge or justice who shall neglect to write the name or names of the witnesses aforesaid on the warrant of commitment, or any sheriff or jailer who shall neglect to endorse the name of said witness or witnesses on any copy of said commitment, shall be fined in the sum of twenty dollars, to be recovered by action of debt in the name of and for the use of any person who shall sue for the same in any court of record. *Gale's Stat.*, 242.

4. *Of the recognizance to give evidence.*

When the justice has concluded the examination, and there appears sufficient ground to suppose that the prisoner is guilty of the offence charged against him, he is to take the recognizance of the prosecutor and other witnesses, to appear and give evidence at the next circuit court having jurisdiction of the offence. 1 *Hale*, 586. 2 *Hale*, 52. *Dalt. Justice*, 534.

By the 4th sec. of "An act to regulate the apprehension of offenders, and for other purposes," it is provided that "It shall be the duty of the judge or justice of the peace who shall commit any offender to jail as aforesaid, or admit him to bail, to bind by recognizance the prosecutor, and all such as do declare anything material, to prove the offence charged, to appear before the next circuit court, on the first day thereof, or if the said court shall be then sitting, on some day to be therein designated (and in all cases at the same time and place as the person or persons accused by said witnesses shall be bound to appear,) to give evidence touching the offence so charged, and not depart the court without leave. If any person, upon being required to enter into recognizance as aforesaid, shall refuse, it shall be lawful for such judge or justice of the peace to commit him or her to jail, there to remain until he or she shall enter into such recognizance, or be otherwise discharged by due course of law." *Gale's Stat.*, 239.

The recognizance must be taken to the people of the state

and signed by the person or persons entering into the same, and certified by the officer taking it, and delivered to the clerk of the circuit court, on or before the day mentioned therein for the appearance of the witness or witnesses. *Gale's Stat.*, 239.

When infants and married women, who cannot legally bind themselves, are required to appear, they must find others to be bound for them. 1 *Chit. Crim. Law*, 91. This doctrine was confirmed in a late case, where a married woman refused to enter into a recognizance for her appearance to give evidence against a felon, and the magistrate committed her, and the court of King's Bench held that the commitment was legal. 3 *Maule & Sel.* 1.

But a justice of the peace is not authorized, by law, to commit a witness willing to enter into a recognizance for his appearance to give evidence against an offender, merely because such witness is unable to find such surety: the party's own recognizance, at the peril of commitment, is all that ought to be required. 1. *Chit. Crim. Law*, 91.

It is not necessary to take a separate recognizance for each witness, but they may all be bound in one.

5. *Of bailing after commitment.*

It appears, by the common law, that, if a party is not ready with bail at the time he is apprehended, and the offence is bailable, he may, at any time before conviction, be released from imprisonment on finding sureties. 1 *Chit. Crim. Law*, 102. And, in such a case, it is said that the prisoner might be bailed by one justice of the peace. *Dalt. Justice*, 552. It has been held that one justice may bail for offences triable at the sessions. 1 *Burn's Justice*, 149. But, where the prisoner was committed for a felony, or other offence bailable by law and which could not be tried at the sessions, it appears to be the usual practice for two justices to take the bail. *Dalt. Justice*, 53, 552.

By our statute, the power of justices of the peace, in bailing offenders, is limited to taking bail of persons committed on a criminal charge for the want thereof before indictment found.

By the 6th sec. of "An act to regulate the apprehension of offenders, and for other purposes," it is provided that, "Where any person shall be committed to jail on a criminal charge, for want of good and sufficient bail, except for treason, murder, or other offence punishable with death, or for not entering into a recognizance to appear and testify, any judge, or any two justices of the peace, may take such bail or recognizance in vacation, and may discharge such prisoner from his or her imprisonment." *Gale's Stat.*, 239.

After the recognizance has been entered into, the justices

before whom the transaction takes place will issue their warrant, called a *liberate*, to the jailor to discharge him. 1 *Chit.Crim. Law*, 102. 4 *Burn's Justice*, 298.

CHAPTER VII.

FORMS OF WARRANTS AND OTHER PROCEEDINGS BEFORE ARREST.

Form of oath of complainant or witness.

You do swear, by the ever living God, that you will true answers make to such questions as shall be put to you touching the present complaint against C. D., so help you God.

Form of affirmation.

You do solemnly, sincerely, and truly declare and affirm, that you will true answers make to such questions as shall be put to you touching the present complaint against C. D., and this you do under the pains and penalties of perjury.

General form of a warrant in the name of the people.

State of Illinois, }
La Salle County, } ss. The people of the state of Illinois to all sheriffs, coroners, and constables of said state:

Whereas, A. B. hath this day made complaint on oath before *Seth B. Farwell*, Esquire, one of the justices of the peace of the said county, that (here set forth the offence.)

We, therefore, command you forthwith to take the said C. D. and bring him before the said *Seth B. Farwell*, Esquire, or, in case of his absence, before any other justice of the peace of the said county, to be dealt with according to law.

Hereof fail not at your peril. Witness, the said *Seth B. Farwell*, Esquire, at *Ottawa*, in said county, the day of 18 *Seth B. Farwell.*

Another form of warrant.

State of Illinois, }
La Salle county, } ss. To all sheriffs, coroners, and constables of said state:

Whereas, A. B. hath this day made complaint on oath be-

fore *Seth B. Farwell*, Esquire, a justice of the peace of the said county, that (here set forth the offence.)

These are, therefore, in the name of the people of the state of Illinois, to command you forthwith to take the said C. D. and bring him before the said justice, or, in case of his absence, before some other justice of the peace of said county, to be dealt with according to law. Hereof fail not, at your peril. In witness whereof, the said justice hath hereunto set his hand, at *Ottawa*, in the county aforesaid, the day of 18 *Seth B. Farwell.*

Form of a warrant directed to a private person.

State of Illinois, }
La Salle county, } ss. To all sheriffs, coroners, and constables of said county, and to *John Duncan*:

Whereas, A. B. hath this day made complaint on oath before *Seth B. Farwell*, Esquire, a justice of the peace of the said county, that (here set forth the offence.)

These are, therefore, in the name of the people of the state of Illinois, to command you forthwith to take the said C. D. and bring him before the said justice, or, in case of his absence, before some other justice of the peace of the said county, to be dealt with according to law. Hereof fail not. In witness whereof, the said justice hath hereunto set his hand, at *Ottawa*, in the county aforesaid, the day of 18
Seth B. Farwell.

Order thereon.

Ordered, that *John Duncan*, named in the within warrant, be hereby authorized to execute the same. (Dated.)
Seth B. Farwell.

Warrant for Larceny.

State of Illinois, }
La Salle county, } ss. To all sheriffs, coroners, and constables of said state:

Whereas, A. B. hath this day made complaint on oath before *Seth B. Farwell*, Esquire, a justice of the peace of the said county, that, on this present day, at *Ottawa*, in said county, divers goods and chattels of him, the said A. B., of the value of *fifty* dollars, that is to say, one silver watch, six silver spoons, and one coat, were feloniously stolen, taken, and carried away, and that he has just cause to suspect, and doth suspect, that C. D. did feloniously steal, take, and carry away the same. These are, therefore, in the name of the people of the state of Illinois, to command you forthwith to take the said C. D. and bring him before the said justice, or, in case of his absence, before some other justice of the peace of said

county, to be dealt with according to law. In witness whereof, the said justice hath hereunto set his hand, at *Ottawa*, in said county, the day of 18

Seth B. Farwell.

Warrant for burglary, when the name of the offender is unknown.

State of Illinois, }
La Salle county, } ss. To all sheriffs, coroners, and constables of said state:

Whereas, A. B. hath this day made complaint on oath before *Seth B. Farwell*, Esquire, a justice of the peace of said county, that, in the night of the day of last, (or "instant,") the dwelling house of him, the said A. B., situate in in said county, was willfully, maliciously, and forcibly broken and entered, with intent the goods and chattels of the said A. B., in the said dwelling house, then and there being, feloniously to steal, take and carry away; and one silver watch, of the value of *twenty* dollars, (state all the articles, with the value of each,) of the goods and chattels of the said A. B., was feloniously and burglariously stolen, taken, and carried away; and that he hath just cause to suspect, and doth suspect, that a man whose name is unknown to the said A. B., but whose person is known to him, and who is employed as the driver of a four horse team, has red hair and has lost his right eye, did break and enter the said dwelling house and commit the said felony and burglary.

These are, therefore, in the name of the people of the state of Illinois, to command you forthwith to take the said man, whose name is so unknown, and bring him before said justice, or, in case of his absence, before some other justice of said county, to be dealt with according to law. In witness whereof the said justice hath hereunto set his hand, at *Ottawa*, in said county, the day of 18 *Seth B. Farwell.*

Warrant to levy hue and cry on a robbery having been committed.

State of Illinois, }
La Salle county, } ss. To all sheriffs, coroners, and constables of the said state:

Whereas, A. B. hath this day made complaint on oath before *Seth B. Farwell*, Esquire, a justice of the peace of said county, that, on this present day of 18 at a place called in the said county, in the public highway there, two persons, to him, the said A. B., unknown, in and upon him, the said A. B., did make an assault, and him, the said A. B., then and there feloniously did put in great fear and danger of his life, and *seventy five* pieces of the coin of the United States, called dollars, of the goods and chattels of him, the said A. B., from the person and against the will of him, the said A. B., then and there forcibly and feloniously did steal,

take, and carry away; and that one of the said persons, to him, the said A. B., unknown, is a tall strong man, and seemeth to be about the age of *thirty five* years, is pitted in the face with small pox, and hath a scar of a wound under his left eye, and had then on a dark brown riding coat, &c., and did ride on a bay gelding, with a star on his forehead. And the other, &c. And that, after the said felony and robbery committed, the said persons, to him, the said A. B., unknown, did fly and withdraw themselves to places unknown, and are not yet apprehended.

These are, therefore, in the name of the people of the state of Illinois, to command you forthwith to raise the power of the precincts in your several counties, and to make diligent search therein for the persons above described, and to make fresh pursuit, and hue and cry after them, from precinct to precinct, and from county to county, as well by horsemen as by footmen, and give due notice thereof, describing the persons and the offence aforesaid, unto every next sheriff, coroner, and constable on every side, until the said persons shall be apprehended; and all persons whom you, or any of you, shall, as well upon such search and pursuit as otherwise, apprehend, or cause to be apprehended, as justly suspected for having committed the said robbery and felony, that you do carry forthwith before some justice of the peace of the county where he or they shall be apprehended, to be by such justice (and some neighboring justice associated with him) examined and dealt with according to law. And hereof fail you not respectively, upon the peril that shall ensue thereon. Given under the hand of said justice, at in the county of *La Salle*, the day of 18

Seth B. Farwell.

Another Form.

State of Illinois, }
La Salle county, } ss. To all sheriffs, coroners, and constables of the said state:

Whereas, A. B. hath this day made complaint on oath before *Seth B. Farwell*, Esquire, one of the justices of the peace of said county, that, on the day of 18 at in the county aforesaid, C. D. in and upon the said A. B. feloniously did make an assault, and one silver watch, the property of the said A. B., from his person and against his will, by force, did then and there feloniously and violently take and carry away; and after the said felony and robbery was committed, the said C. D. did fly and withdraw himself to places unknown, and is not yet apprehended:

These are, therefore, in the name of the people of the state of Illinois, to command you, and every of you, to search within your several counties for the said C. D., and, also,

make hue and cry after him from precinct to precinct, and from county to county, and that as well by horsemen as footmen, and, if you shall find him, the said C. D., that then you carry him before some one of the justices of the peace within the county where he shall be taken, to be dealt with according to law. Hereof fail you not respectively, at your peril. Given under the hand of said justice, at in the county aforesaid, this day of 18

Seth B. Farwell.

FORMS OF STATEMENT OF OFFENCES IN WARRANTS.

OFFENCES AGAINST PERSONS.

For murder by shooting with a gun. Crim. Code, Sec. 22.

(Commence as before, page 70;) that, on the day of instant, (or last,) at in the county aforesaid, C. D. did, feloniously, wilfully, and of his malice aforethought, fire a gun, loaded with powder and ball, at G. H., and gave to him one mortal wound, of which he instantly died. (Conclude as before, page 70.)

For murder by stabbing. Crim. Code, Sec. 22.

Commence as before, page 70;) that, on the day of instant, (or last,) at in the county aforesaid, C. D. did, feloniously, wilfully, and of his malice aforethought, with a knife, stab one G. H. and give him several mortal wounds, of which said mortal wounds the said G. H. languished a short time and then died. (Conclude as before, page 70.)

For murder by striking. Crim. Code, Sec. 22.

(Commence as before, page 70;) that, on the day of, &c., at in the county aforesaid, C. D. did, feloniously, wilfully, and of his malice aforethought, with an iron poker, strike one G. H. and give him one mortal wound, of which said mortal wound the said G. H. languished a short time and then died. (Conclude as before, page 70.)

For suspicion of murder. Crim. Code, Sec. 22.

(Commence as before, page 70;) that, on this present day, at in the county aforesaid, one G. H. was, feloniously, wilfully, and of malice aforethought, killed and murdered; and that he, the said A. B., hath just cause to

suspect, and doth suspect, that C. D. did commit the said felony and murder. (Conclude as before, page 70.)

The like, in another form.

(Commence as before, page 70;) that, on the day of instant, at in the county aforesaid, one G. H. was found dead, and that he, the said A. B., hath just cause to suspect, and doth suspect, that the said G. H. was, on that day, feloniously, wilfully, and of malice aforethought, killed and murdered, and that C. D. did commit the said felony and murder. (Conclude as before, page 70.)

For murder by poison.

(Commence as before, page 70;) that, on, &c., at, &c., C. D. did, feloniously, wickedly, and of his malice aforethought, administer (*or cause and procure to be administered*) unto G. H. a large quantity of deadly poison, called arsenic, with intent to kill and murder the said G. H., which poison was actually taken by the said G. H., by means whereof the said G. H. became sick and greatly distempered in his body, of which sickness, until the day of at the place in the county aforesaid, he did languish, and, languishing, did live, and afterwards, on the day and at the place aforesaid, he, the said G. H., of the poison and sickness and distemper occasioned thereby, died. (Conclude as before, page, 70.)

For suspicion of murder by poison.

(Commence as before, page 70;) that, on, &c., at, &c., one G. H. died, and that he, the said A. B., hath just cause to suspect, and doth suspect, that, on the said day of at in the county aforesaid, C. D. did, feloniously, wilfully, and of his malice aforethought, administer to the said G. H. a certain deadly poison, called arsenic, by reason whereof the said G. H. languished a short time and then died. (Conclude as before, page 70.)

Form against accessory before the fact as principal.

(Commence as before, page 70;) that, on, &c., at, &c., L. M. did, feloniously, wilfully, and of his malice aforethought, assault one G. H. and feloniously, wilfully, and of his malice aforethought, with his hands and feet, did strike, beat, kick, and give to him, the said G. H., several mortal wounds, of which said mortal wounds the said G. H. instantly died; and that C. D. was present aiding, abetting, and assisting the said L. M. in the said murder. (Conclude as before, page 70.)

For suspicion of murder against accessory before the fact.

(Commence as before, page 70;) that, on, &c., at, &c., one G. H. was murdered, and that he, the said A. B., hath just cause to suspect, and doth suspect, that L. M. did commit the said murder; and that C. D. was then and there present, and did aid, abet, and assist the said L. M. in the said murder. (Conclude as before, page 70.)

Against an accessory after the fact of murder.

(Commence as before, page 70;) that, on, &c., at, &c., L. M. did, feloniously, wilfully, and of his malice aforethought, make an assault upon G. H., and the said L. M., with both his hands about the neck and throat of him, the said G. H., then and there feloniously, wilfully and of his malice aforethought, did choke and strangle, of which said choking and strangling he, the said G. H., instantly died, and that C. D., well knowing the said L. M. to have done and committed the said felony and murder, afterwards, on the day of in the county aforesaid, did conceal the said felony and murder from the magistrates of said county. (Conclude as before, page 70.)

Another form.

(Commence as before, page 70;) that, on, &c., at, &c., L. M. did, feloniously, wilfully, and of his malice aforethought, cast and throw a stone in and upon G. H., and did strike and wound the said G. H., giving the said G. H., by the casting and throwing of the stone, a mortal wound, of which mortal wound the said G. H. instantly died; that on, &c., at, &c., the said L. M. was charged with the said felony and murder before Esquire, one of the justices of said county, and a warrant issued for the arrest of the said L. M.; and that C. D., having full knowledge that the said L. M. had done and committed the said felony and murder, afterwards, to wit, on, &c., at, &c., in the county *aforesaid*, him, the said L. M., feloniously, did harbor and protect, with intent that the said L. M. might avoid an arrest. (Conclude as before, page 70.)

For manslaughter. Crim. Code, Sec. 25.

(Commence as before, page 70;) that, on this present day, at in the county aforesaid, C. D. did, feloniously and wilfully, with a certain stick, strike one G. H. and give him one mortal wound, of which mortal wound the said G. H. languished a short time and then died. (Conclude as before, page 70.)

For suspicion of manslaughter.

(Commence as before, page 70;) that, on, &c., at, &c., in the county aforesaid, one G. H. was feloniously and wilfully killed, and that he, the said A. B., hath just cause to suspect, and doth suspect, that C. D. did commit the said felony. (Conclude as before, page 70.)

For a mother concealing the death of a bastard child. Crim. Code, Sec. 41.

(Commence as before, page 70;) that C. D., a single woman, on the day of 18 at in the county aforesaid, being pregnant with a male child, was then and there delivered of the said child alive, which said male child then and there instantly died, and which said male child, by the laws of this state, was a bastard; and that the said C. D. did then and there endeavor privately to conceal the death of the said child, so that it might not come to light whether it was murdered or not; contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

For duelling. Crim. Code, Sec. 43.

(Commence as before, page 70;) that, on, &c., at, &c., C. D. did, wilfully and maliciously, engage in and fight a duel with one L. M., with deadly instruments, the probable consequence of fighting with which might have been the death of either of them, the said C. D. and L. M.; in which duel, fought as aforesaid, the said C. D. did kill the said L. M., contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

Another form.

(Commence as before, page 70;) that, on, &c., at, &c., C. D. and L. M. did, by agreement, engage in and fight a duel with each other with deadly weapons, the probable consequence of fighting with which might have been the death of either party, in which duel, fought as aforesaid, the said C. D. did inflict a wound in and upon the said L. M., whereof the said L. M. died within one year thereafter, to wit, on the day of 18 contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

For challenging a person to fight a duel. Crim. Code, Sec. 44.

(Commence as before, page 70;) that C. D., on the day of 18 in the county aforesaid, unlawfully did challenge G. H. to fight a duel with and against him, the said C. D., with deadly weapons, the probable issue of which might result in the death of either of said parties, contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

For accepting a challenge to fight a duel. Crim. Code, Sec. 44.

(Commence as before, page 70;) that on, &c., at, &c., C. D. did accept a challenge to fight a duel with one G. H., and did then and there consent to fight therein with him, the said G. H., with deadly weapons, the probable issue of which might result in the death of either of said parties, contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

For delivering a challenge. Crim. Code, Sec. 45.

(Commence as before, page 70;) that on, &c., at, &c., C. D. did, unlawfully and knowingly, deliver a *written challenge* from, and on the part and by the desire of, G. H. to L. M. to fight a duel with said L. M. with deadly instruments, the probable consequence of fighting with which might be the death of either party, contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

For being present at the fighting of a duel as a second. Crim. Code, Sec. 45.

(Commence as before, page 70;) that on, &c., at, &c., L. M. did by agreement fight a duel with G. H., with deadly weapons, the probable consequence of fighting with which might have been the death of either of the said parties; and that C. D. was present at the fighting of the said duel as the second of the said L. M., contrary to the form of the statute in such cases made and provided. (Conclude as before, page 70.)

For an attempt to murder by poisoning. Crim. Code, Sec. 46.

(Commence as before, page 70;) that on, &c., at, &c., C. D., intending to cause the death of G. H., did, wilfully and maliciously, administer to him, the said G. H., a certain poi-

son called arsenic, which was actually taken by the said G. H., but whereof death did not ensue. (Conclude as before, page 70.)

For administering poison to procure the miscarriage of a woman with child. Crim. Code, Sec. 46.

(Commence as before, page 70;) that on, &c., at, &c., C. D. did administer to G. H., a woman then being with child, a large quantity of a certain noxious and destructive substance called savin, with intent thereby to procure the miscarriage and premature birth of the said child with which the said G. H. was then and there pregnant, contrary to the form of the statute in such cases made and provided. (Conclude as before, page 70.)

For mayhem. Crim. Code, Sec. 47.

(Commence as before, page 70;) that on, &c., at, &c., C. D. did unlawfully, with a certain axe, strike and cut the right hand of the said A. B. and thereby rendered the same useless. (Conclude as before, page 70.)

Another form.

(Commence as before, page 70;) that on, &c., at, &c., C. D. voluntarily and of purpose, with a certain dirk-knife, unlawfully put out the left eye of the said A. B. (Conclude as before, page 70.)

For a rape. Crim. Code, Sec. 48.

(Commence as before, page 70;) that on, &c., at, &c., C. D. in and upon the said A. B. violently and feloniously did make an assault, and her, the said A. B., against her will, then and there forcibly did ravish and carnally know. (Conclude as before, page 70.)

For having carnal knowledge of a female child under ten years of age. Crim. Code, Sec. 48.

(Commence as before, page 70;) that on, &c., at, &c., C. D., a male person above the age of fourteen years, in and upon one G. H., a female child under the age of ten years, feloniously did make an assault, and her, the said G. H., then and there wickedly, unlawfully, and feloniously did carnally know. (Conclude as before, page 70.)

For Sodomy. Crim. Code, Sec. 50.

(Commence as before, page 70;) that on, &c., at, &c., C. D. in and upon one G. H. feloniously did make an assault, and then and there feloniously, wickedly, and against the order of nature had a venereal affair with the said G. H., and then and there, feloniously, wickedly, and against the order of nature, with the said G. H. did commit and perpetrate the detestable and abominable crime of buggery. (Conclude as before, page 70.)

Another form.

(Commence as before, page 70;) that on, &c., at, &c., C. D., with a certain cow then and there being, feloniously, wickedly, and against the order of nature, had a venereal affair, and then and there feloniously, wickedly, and against the order of nature carnally knew the said cow, and then and there feloniously, wickedly, and against the order of nature, with the said cow did commit and perpetrate the detestable and abominable crime of buggery. (Conclude as before, page 70.)

For an assault with intent to commit murder. Crim. Code, Sec. 53.

(Commence as before, page 70;) that on, &c., at, &c., C. D. in and upon the said A. B. did, unlawfully, wilfully, and feloniously, make an assault with a drawn sword with intent him, the said A. B., feloniously, wilfully, and of his malice aforethought, to kill and murder. (Conclude as before, page 70.)

For an assault with intent to commit a rape. Crim. Code, Sec. 52.

(Commence as before, page 70;) that on, &c., at, &c., C. D. in and upon A. B. unlawfully did make an assault with intent her, the said A. B., against her will, forcibly to ravish and carnally know. (Conclude as before, page 70.)

For an assault with intent to commit robbery. Crim. Code, Sec. 52.

(Commence as before, page 70;) that on, &c., at, &c., C. D. in and upon the said A. B. did, feloniously and violently, make an assault with intent the moneys of the said A. B. from the person and against the will of the said A. B. forcibly to steal, take, and carry away. (Conclude as before, page 70.)

For an assault with a deadly weapon with intent to inflict a bodily injury. Crim. Code, Sec. 52.

(Commence as before, page 70;) that on, &c., at, &c., C.

D., with an abandoned heart and without provocation, did, feloniously, with a deadly weapon, to wit, an axe, make an assault upon the said A. B. with an intent to inflict upon the person of the said A. B. a bodily injury. (Conclude as before, page 70.)

For false imprisonment. Crim. Code, Sec. 54.

(Commence as before, page 70;) that on, &c., at, &c., C. D. unlawfully and forcibly assaulted the said A. B. and him, the said A. B., without sufficient legal authority and against his will, did detain for a long time, to wit, for the space of three days then next following. (Conclude as before, page 70.)

For kidnapping. Crim. Code, Sec. 56.

(Commence as before, page 70;) that on, &c., at, &c., C. D. did feloniously and forcibly steal and take E. F. and carry him to the state of Louisania, contrary to the form of the statute in such case made and provided, without having established a claim to the said E. F. according to the law of the United States. (Conclude as before, page 70.)

Another Form.

(Commence as before, page 70;) that on, &c., at, &c., C. D. did, feloniously and without lawful authority, forcibly arrest E. F. with a design to take him out of this state, without having established a claim according to the laws of the United States, contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

For kidnapping free negroes. Crim. Code, Sec. 57.

(Commence as before, page 70;) that on, &c., at, &c., C. D., by false promises and misrepresentations, did persuade E. F., a negro not being a slave, to go to the state of Kentucky, for the purpose and with the intent to sell such negro into slavery, contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

CRIMES AND OFFENCES AGAINST HABITATIONS AND OTHER BUILDINGS.

For arson. Crim. Code, Sec. 58.

(Commence as before, page 70;) that on, &c., at, &c., C. D. did, wilfully and maliciously, set fire to and burn the dwel-

ling house of the said A. B., situate in in the county aforesaid. (Conclude as before, page 70.)

Another form.

(Commence as before, page 70;) that on, &c., at, &c., C. D. did, wilfully and maliciously, set fire to and burn the school-house situate in township number thirty three north, in range three, east of the third principal meridian, in the county aforesaid, contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

For suspicion of arson.

(Commence as before, page 70;) that on, &c., at, &c., the barn of the said A. B., situate in the county aforesaid, was, willfully and maliciously, set fire to and burned, and that he, the said A. B., has just cause to suspect, and does suspect, that C. D. did, wilfully and maliciously, set fire to and burn the said barn. (Conclude as before,page 70.)

For setting fire to a storehouse, &c., with intent to burn the same. Crim. Code, Sec. 59.

Commence as before, page 70;) that on, &c., at, &c., C. D. did, wilfully and maliciously, set fire to the storehouse of A. B., situate in in the county aforesaid, with intent to burn the same, but which storehouse was not thereby burned: contrary to the form of the statute in such case made and provided. (Conclude as before, page, 70.)

For burglary and larceny.

(Commence as before, page 70;) that, in the night of the day of *instant*, C. D. did wilfully, maliciously, and forcibly break and enter the dwelling house of A. B., with intent the goods and chattels of the said A. B. then and there feloniously and burglariously to steal, take, and carry away; and in the said dwelling house one silver watch, of the value of twenty five dollars, of the goods and chattels of the said A. B., then and there did feloniously and burglariously steal, take, and carry away. (Conclude as before, page 70.)

For suspicion of burglary and larceny.

(Commence as before, page 70;) that, in the night of the day of *instant*, the ware-house of him, the said A. B., situate in in the county aforesaid, was wilfully and maliciously entered, without force, by a window then and there being open, with intent

the goods and chattels of G. H. then and there being feloniously and burglariously to steal, take, and carry away; and one box of dry goods, of the value of one hundred and fifty dollars, of the goods and chattels of him, the said G. H., was feloniously and burglariously stolen, taken, and carried away from thence; and that he, the said A. B., hath just cause to suspect, and doth suspect, that C. D. did commit the said felony and burglary. (Conclude as before, page 70.)

For burglary. Crim. Code, Sec. 60.

(Commence as before, page 70;) that, in the night of the day of *instant*, C. D. did, wilfully, maliciously, and forcibly break and enter the shop of the said A. B., situate in in the county aforesaid, with intent the goods and chattels of him, the said A. B., then and there being, feloniously and burglariously to steal, take, and carry away, contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

For suspicion of burglary.

(Commence as before, page 70;) that, in the night of the day of *instant*, the mill of the said A. B., situate in in the county aforesaid, was wilfully and maliciously and forcibly broken and entered, with intent the goods and chattels of G. H. then and there being feloniously and burglariously to steal, take, and carry away, contrary to the form of the statute in such case made and provided; and that the said A. B. hath just cause to suspect, and doth suspect, that C. D. did commit the said felony and burglary. (Conclude as before, page 70.)

CRIMES AND OFFENCES RELATIVE TO PROPERTY.

For Robbery. Crim Code, Sec. 61.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. in and upon the said A. B. did feloniously make an assault, and him, the said A. B., in bodily fear and danger of his life then and there feloniously did put, and one gold watch of the value of seventy five dollars, of the goods and chattels of him, the said A. B., from the person and against the will of the said A. B. then and there feloniously

and violently did steal, take, and carry away. (Conclude as before, page 70.)

Another form.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. in and upon the said A. B. feloniously did make an assault, and one leathern purse with ten current silver dollars therein, the property of the said A. B., from his person and against his will by force did then and there feloniously and violently steal, take, and carry away. (Conclude as before, page 70.)

For larceny. Crim. Code, Sec. 62.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. did feloniously steal, take, and carry away three pair of shoes of the value of five dollars of the goods and chattels of the said A. B. (Conclude as before, page 70.)

For suspicion of larceny.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, divers goods and chattels of the said A. B., to wit, one coat, one vest of the value of ten dollars, and six silver spoons, of the value of thirty dollars, were feloniously stolen, taken and carried away; and that he hath just cause to suspect, and doth suspect, that C. D. did feloniously steal, take, and carry away the same. (Conclude as before, page 70.)

For suspicion of stealing a horse.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, a sorrel horse, of the value of fifty dollars, the property of the said A. B., was feloniously stolen, taken, and led away, (or if for oxen, cows, sheep, &c., "driven away,") and that the said A. B. hath just cause to suspect, and does suspect, that C. D. did feloniously steal, take, and lead away the same. Conclude as before, page 70.)

For suspicion of larceny in stealing writings relating to real estate.

Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, a certain written (or partly printed and partly written) paper, to wit, a deed, being evidence of the ti-

tle of the said A. B. to a certain real estate known and described as follows,viz., (describe the real estate,) in which said real estate the said A. B. then and there had, and still has, a present interest, was feloniously stolen, taken, and carried away; and the said A. B. has just cause to suspect, and does suspect, that C. D. did feloniously steal, take, and carry away the same. (Conclude as before, page 70.)

For suspicion of larceny in stealing a promissory note.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, one promissory note for the payment of fifty dollars, made by E. F. and payable to the said A. B., was feloniously stolen, taken, and carried away; and that the said A. B. has just cause to suspect, and does suspect, that C. D. did feloniously steal, take, and carry away the same. (Conclude as before, page 70.)

For picking pockets or otherwise privately stealing from the person. Crim. Code, Sec. 62.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D., from the person of the said A. B., one pocket handkerchief of the value of one dollar, one silver watch of the value of fifteen dollars, of the goods and chattels of the said A. B. subtilely, privately, craftily, and without the knowledge of the said A. B., then and there feloniously did steal, take, and carry away. (Conclude as before, page 70.)

For larceny in stealing from a house in the day time. Crim. Code, Sec. 62.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, in the day time, divers goods and chattels of the said A. B. of the value of twenty five dollars, to wit, (describe the property,) in the house of the said A. B. then and there being, were feloniously stolen, taken, and carried away; and that the said A. B. has just cause to suspect, and does suspect, that C. D. did feloniously steal, take, and carry away the same. (Conclude as before, page 70.)

For receiving stolen goods. Crim Code, Sec. 63.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D., for his own gain, did feloniously buy of one G. H. one piece of broadcloth, of the value of fifty dollars, of the goods and chattels of the said A. B., by the said G. H. then lately before feloniously stolen, he, the said C. D.,

well knowing the said piece of broadcloth to have been feloniously stolen. (Conclude as before, page 70.)

For suspicion of receiving stolen goods.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, divers goods and chattels of the said A. B., of the value of fifty dollars, that is to say, (describe the property,) were feloniously stolen by a certain ill-disposed person to the said A. B. unknown, (or "by one G. H.,") and that he, the said A. B., has just cause to suspect, and does suspect, that C. D., at in the county aforesaid, to prevent the said A. B. from again possessing his property, has received the said goods and chattels of the said ill-disposed person, (or "of the said G. H.,") he, the said C. D., well knowing the goods and chattels to have been feloniously stolen. (Conclude as before, page 70.)

For marking or branding a horse, &c., with intent to steal. Crim. Code, Sec. 65.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. did feloniously mark (or "brand") a certain bay mare, the property of the said A. B., with intent thereby feloniously to steal, take, and lead away the same, contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

For altering or defacing marks or brands. Crim Code, Sec. 65.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, the mark (or "brand") of one cow, the property of the said A. B., was feloniously altered, (or "defaced,") with intent thereby the said cow feloniously to steal, take, and drive away, (or "to prevent the identification of the said cow by the said A. B.;") and that the said A. B. has just cause to suspect, and does suspect, that C. D. did feloniously alter (or "deface") the said mark, (or "brand,") contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

For officers embezzling money, &c. Crim. Code, Sec. 66.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. was treasurer of the said county of and was entrusted with, and had the charge and custody of, certain money belonging to, and being the

property of, the said county, that is to say, one thousand dollars in the current coin of the United States, and then and there feloniously did embezzle, steal, and secrete the said money, so in his charge and custody as aforesaid, contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

For officers failing and refusing to pay over money, &c. Crim. Code, Sec. 67.

(Commence as before, page 70;) that on the day of 18 C. D. was collector of the county of entrusted by law to collect the revenue belonging to the said county, and then and there had collected and received one thousand dollars, current money of the United States, for and on account of the revenue of the said county; and the said C. D. not regarding his duty as such collector, but afterward, on the day of 18 at in the county aforesaid, demand for the payment of the said money having been duly made by the treasurer of the said county, fraudulently and unlawfully failed and refused to pay over the said money to the said treasurer, contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

For fraudulently and maliciously destroying papers, &c. Crim. Code, Sec. 68.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. did feloniously and maliciously burn a bond for securing the payment of the sum of one hundred dollars, executed by G. H. to the said A. B., the property of the said A. B., with intent to defraud, prejudice, and injure the said A. B., contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

For removing landmarks. Crim. Code, Sec. 69.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. did knowingly, maliciously, and fraudulently cut, fell, and remove a certain tree, being a boundary tree of the land of the said A. B., situate in the said county, to the wrong of the said A. B., contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

For embezzlement, &c., by a clerk, servant, &c. Crim. Code, Sec. 70.

(Commence as before, page 70;) that C. D. was the *clerk* of the said A. B., on the day of 18 in the county aforesaid, and that the said A. B. did then and there entrust to the said C. D. (describe the property) the goods and chattels of him, the said A. B.; and that the said C. D. then and there did withdraw himself from the said A. B., and went away with the said goods and chattels, with intent feloniously to steal, take, and carry away the same and to defraud the said A. B. thereof, contrary to the trust and confidence in him reposed by the said A. B., contrary to the form of the statute in such case made and provided. (Conclude as before, page, 70.)

Another form.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. then and there being in the service and employment of the said A. B., and being so employed, the said A. B. then and there entrusted and delivered to him one hundred pieces of silver coin called dollars, and the said C. D. afterwards, and whilst he was in the service of the said A. B., on the day and year and in the county aforesaid, did feloniously embezzle and convert the said money to his own use, with intent feloniously to steal, take, and carry away the same, contrary to the trust and confidence reposed in him by the said A. B., contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

FORGERY AND COUNTERFEITING.

For forging a will. Crim. Code, Sec. 73.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. did feloniously and falsely forge and counterfeit a certain will purporting to be the last will and testament of G. H., deceased, with intent to damage and defraud the said A. B. (Conclude as before, page 70.)

For suspicion of forging a deed of lands. Crim. Code, Sec. 73.

(Commence as before, page 70;) that on, &c., at, &c., in

the county aforesaid, a certain deed, purporting to be a deed executed by the said A. B. to the said C. D., and by which the right and interest of the said A. B. to certain lands situate in the said county purport to be transferred and conveyed by the said A. B. to the said C. D., has been feloniously and falsely forged and counterfeited, and that the said A. B. has just and reasonable grounds to suspect, and does suspect, that the said C. D. did feloniously forge and counterfeit the said deed with intent to damage and defraud the said A. B. (Conclude as before, page 70.)

For forging a promissory note. Crim. Code, Sec. 73.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. did feloniously and falsely make, forge, and counterfeit a certain promissory note, purporting to be the promissory note of the said A. B. to the said C. D., for the payment of the sum of *fifty* dollars, with intent to damage and defraud the said A. B. (Conclude as before, page 70.)

For suspicion of forging a promissory note.

(Commence as before, page 70;) that a certain promissory note, purporting to be a promissory note from the said A. B. to C. D., for the payment of the sum of *fifty* dollars, has lately, at in the county aforesaid, been feloniously and falsely made, (or "altered,") forged, and counterfeited, and that the said A. B. has just and reasonable grounds to suspect, and does suspect, that the said C. D. did feloniously commit the said forgery, with intent to damage and defraud the said A. B. (Conclude as before, page 70.)

For suspicion of forging a receipt. Crim. Code, Sec. 73.

(Commence as before, page 70;) that a certain receipt, purporting to have been made and signed by the said A. B., and that the said A. B. had received from C. D. the sum of *fifty* dollars, has lately, at in the county aforesaid, been feloniously and falsely made, (or "altered,") forged, and counterfeited, and the said A. B. has just and reasonable grounds to suspect, and does suspect, that the said C. D. did feloniously commit the said forgery with intent to damage and defraud the said A. B. (Conclude as before page, 70·)

For suspicion of forging bank notes.

(Commence as before, page 70;) that lately, at in the county aforesaid, three promissory notes, purporting

to have been made and issued by the president, directors, and company of the bank of Auburn, a corporation duly authorized for that purpose by the laws of the state of New York, for the payment of *five* dollars each, were feloniously and falsely made, (or "altered,") forged, and counterfeited; and that the said A. B. has just and reasonable grounds to suspect, and does suspect, that C. D. did feloniously and falsely make, (or "alter,") forge, and counterfeit the said promissory notes, with intent to damage and defraud the said president, directors, and company of the Bank of Auburn. (Conclude as before, page 70.)

For uttering a forged bank note.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. did feloniously utter, publish, and pass to the said A. B., as true and genuine, a certain false, forged, and counterfeited promissory note, purporting to have been issued by the president, directors, and company of the Bank of Missouri, a corporation duly authorized for that purpose by the laws of the state of Missouri, for the payment of the sum of twenty dollars, knowing the same to be false, forged, and counterfeited; with intent to prejudice, damage, and defraud the said A. B. (Conclude as before, page 70.)

For uttering an altered bank note.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. did feloniously utter, publish, and pass as true and genuine, a certain false, altered, and counterfeited promissory note, purporting to be a promissory note issued by the State Bank of Indiana, a corporation duly authorized for that purpose by the laws of the state of Indiana, for the payment of the sum of ten dollars, which had been altered from a promissory note of the State Bank of Indiana for the payment of the sum of one dollar, to make the same resemble a note for the payment of the sum of ten dollars, he, the said C. D., knowing the same to be altered and counterfeited; with intent to prejudice, damage, and defraud the said State Bank of Indiana. (Conclude as before, page 70.)

For uttering a forged county order.

Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. did feloniously utter, publish, and pass as true and genuine, a certain county order, purporting to be drawn by M. M., the clerk of the county commissioners' court of the county of La Salle, upon the treasurer of the

said county, and payable to G. H.; with intent to damage and defraud the said county of La Salle. (Conclude as before, page 70.)

For counterfeiting coin. Crim. Code, Sec. 74.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. did feloniously counterfeit three pieces of the silver coin current in this state by the laws and usages thereof, called Spanish milled dollars. (Conclude as before, page 70.)

For suspicion of counterfeiting coin.

(Commence as before, page 70;) that on the day of instant, ten counterfeit pieces of gold coin, of the kingdom of Great Britain, current in this state, called guineas, were found concealed in the barn of C. D., situate in the county aforesaid; and that he, the said A. B., hath just and reasonable grounds to suspect, and does suspect, that the said C. D. did feloniously counterfeit the same. (Conclude as before, page 70.)

For passing or giving in payment counterfeit coin. Crim. Code, Sec. 74.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. did feloniously pass, or give in payment to the said A. B., as true and genuine, one counterfeit piece of the gold coin of the United States, current in this state, called an eagle, knowing the same to be counterfeit; with intent to defraud the said A. B. (Conclude as before, page 70.)

For offering to pay or give in payment counterfeit coin.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. did offer to pass, or give in payment, as true and genuine, to the said A. B., five counterfeit pieces of the gold coin of the United States current in this state, called half eagles, knowing the same to be counterfeit; with intent to defraud the said A. B. (Conclude as before, page 70.)

For having in posession counterfeit coin with intent to utter. Crim. Code, Sec. 75.

(Commence as before, page 70;) that on, &c., at, &c., in

the county aforesaid, C. D. feloniously had in his possession five counterfeit pieces of the silver coin current in this state called Mexican dollars, knowing the same to be counterfeit; with intent to defraud the said A. B. by uttering or passing the same to him as true and genuine. (Conclude as before, page 70.)

For having in possession forged bank bills with intent to pass them. Crim. Code, Sec. 75.

(Commence as before, page 70;) that, on this present day, at, &c., in the county aforesaid, C. D. feloniously had in his possession certain forged promissory notes commonly called bank bills, purporting to have been issued by the president, directors, and company of the Bank of Newburgh, a corporation duly authorized for that purpose by the laws of the state of New York, for the payment of ten dollars each, knowing the same to be forged, with intent to utter or pass the same as true and genuine; with intent to defraud the said Bank of Newburgh. (Conclude as before, page 70.)

For having in possession fictitious notes with intent to utter. Crim. Code, Sec. 77.

(Commence as before, page 70;) that, on this present day, at in the county aforesaid, C. D. feloniously had in his possession certain fictitious bills or notes, purporting to be the bills or notes of the Drover's Bank of the county of Ashtabula, in the state of Ohio, for the payment of five dollars each, when in fact there is no such bank in existence, he, the said C. D., knowing the said bills or notes to be fictitious, with intent to pass, utter, and publish the same as true; with intent to defraud the said A. B. (Conclude as before, page 70.)

For having in possession apparatus for counterfeiting coin. Crim. Code, Sec. 78.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. knowingly had in his possession a certain tool and instrument designed for and made use of in counterfeiting the coin current in this state, called a die, with intent to use and employ the same, or to cause and permit the same to be used and employed, in coining and making the false coin as aforesaid. (Conclude as before, page 70.)

For having in possession apparatus for counterfeiting bank bills.

(Commence as before, page 70;) that on this present day, at in the county aforesaid, C. D. knowingly had in his possession a certain plate, engraven, devised, and designed for, and made use of in, counterfeiting bills or notes in the similitude of the bills or notes which have been issued by the Bank of Missouri, the same being a bank or banking company established by law in the state of Missouri, with intent to use and employ the same, or cause and permit the same to be used and employed, in making such counterfeit bills or notes of the said Bank of Missouri. (Conclude as before, page 70.)

CRIMES AND OFFENCES AGAINST PUBLIC JUSTICE.

For perjury. Crim. Code, Sec. 82.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, a certain cause, in which G. H. was plaintiff and the said A. B. defendant, was tried before L. M., Esquire, a justice of the peace of the said county of *La Salle;* and that, upon the trial of the said cause, C. D. appeared as a witness for, and on behalf of, the said G. H., and was then and there duly sworn (or affirmed) by the said L. M., Esquire, who had full power and authority to administer the oath, (or affirmation,) that the evidence he should give relating to the matter in difference between the said parties, should be the truth, the whole truth, and nothing but the truth; and that, upon the trial of the said cause, it became a material question whether the said G. H. had sold to the said A. B. ten bushels of wheat; and that thereupon the said C. D., being so sworn as aforesaid, did then and there, to wit, on the trial of said cause before the said L. M., Esquire, justice as aforesaid, falsely, willfully, and corruptly depose, swear, (or affirm,) and give in evidence, amongst other things, in substance as follows, to wit, that on or about the day of 18 the said G. H. did sell to the said A. B. ten bushels of wheat, whereas in truth and in fact the said G. H. did not, on or about the day of 18 or at any other time, sell to the said A. B. ten bushels of wheat, or any other quantity of wheat. (Conclude as before, page 70.)

For subornation of perjury.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, a certain cause, in which G. H. was plaintiff and the said A. B. was defendant, was depending before L. M., Esquire, a justice of the peace of the said county of *La Salle;* and, whilst the same was depending, to wit, on the day of in the year aforesaid, in the county aforesaid, C. D., wickedly contriving and intending to prevent the due course of law and justice and to aggrieve the said A. B., the defendant in the said cause, and to subject him to the payment of a large sum of money and heavy costs, did, wickedly and corruptly, solicit, suborn, and procure one J. W. to be and appear as a witness at the trial of the said cause, for and on behalf of the said G. H., the plaintiff, and, upon the trial of the said cause, falsely, wickedly, and corruptly to swear and give in evidence to and before the said L. M., Esquire, justice of the peace as aforesaid, certain matters material and relevant to the matters in issue in said cause, in substance as follows, to wit, that on or about the day of 18 the said G. H. sold and delivered to the said A. B. a horse, for the consideration of forty dollars, which the said A. B. promised to pay in one month from the time of the delivery of the horse, and that the said consideration was not paid at the time of delivery, whereas, in truth and in fact, the said A. B., at the time of delivery, did pay to the said G. H. the sum of forty dollars, the full consideration for the said horse, and did not promise to pay the same in one month from the time of the delivery thereof: and afterwards, to wit, on the day of 18 before the said L. M., Esquire, justice of the peace as aforesaid, in the county aforesaid, the said cause was tried, and, upon the trial, the said J. W., in consequence and by the means, encouragement, and effect of the said wicked and corrupt subornation and procurement of the said C. D., did then and there appear as a witness for and on behalf of the said G. H., the plaintiff, and was then and there duly sworn before the said L. M., Esquire, then being justice of the peace as aforesaid, and having sufficient and competent power and authority to administer an oath that the evidence which he should give touching the matters in question between the said parties should be the truth, the whole truth, and nothing but the truth: and the said J. W., being so sworn as aforesaid, at the said trial, upon his oath, falsely, wilfully, and corruptly did depose and swear, among other things, in substance as follows, to wit, that on or about the day of 18 the said G. H. sold and delivered to the said A. B. a horse, for the consideration of forty dollars, which the said A. B. promised to pay in one month from the time of the de-

livery of the horse, and that the said consideration was not paid at the time of delivery, whereas, in truth and in fact, the said A. B., at the time of delivery, did pay to the said G. H. the sum of forty dollars, the full consideration for said horse, and did not promise to pay the same in one month from the time of the delivery thereof; and whereas, in truth and in fact, the said C. D., at the time he so solicited, suborned, and procured the said J. W. falsely, wickedly, and corruptly to swear as aforesaid, well knew that the said A. B., at the time of the delivery, did pay to the said G. H. the sum of forty dollars, the full consideration for said horse, and did not promise to pay the same in one month from the time of the delivery. (Conclude as before, page 70.)

For acknowledging a deed in the name of another. Crim. Code, Sec. 91.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. did, falsely and without due authority so to do, personate the said A. B., and did then and there feloniously acknowledge, in the name of the said A. B., before L. M., Esquire, a justice of the peace for said county, a certain deed of land situate in the said county, from the said A. B. to one G. H. (Conclude as before, page, 70.)

For resisting an officer in the discharge of his duty. Crim. Code, Sec. 92.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. did knowingly and wilfully obstruct, resist, and oppose the said A. B., who was then and there a constable of the said county, in attempting to serve an execution upon the goods and chattels of G. H.; which execution was issued by L. M., Esquire, a justice of the peace of the said county, and delivered to the said A. B., constable as aforesaid, to be by him executed upon a judgment rendered by the said justice of the peace against the said G. H., in favor of E. F. (Conclude as before, page 70.)

For rescuing a person from custody on civil process. Crim. Code, Sec. 98.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, L. M., Esquire, a justice of the peace of said county, issued a capias against G. H. and delivered the same to A. B., one of the constables of the said county, wherein he was commanded to bring the body of the said G.

H. forthwith before the said justice of the peace, unless special bail be entered, then to command him to appear before the said justice on a certain day therein specified, to answer the complaint of E. F. for a failure to pay him a certain demand not exceeding one hundred dollars; that afterwards, on the same day and in the county aforesaid, the said A. B., constable as aforesaid, arrested the said G. H. on the said capias and had him in custody; that afterwards, on the day and year last aforesaid, in the county aforesaid, C. D. out of the custody of the said A. B., constable as aforesaid, did unlawfully and forcibly rescue the said G. H. (Conclude as before, page 70.)

For a rescue after conviction. Crim. Code, Sec. 93.

(Commence as before, page 70;) that G. H., at the last March term of the circuit court held in and for the county of La Salle, was tried upon an indictment there preferred against him for larceny, to wit, for feloniously stealing, taking, and carrying away one silver watch, the property of E. F., and found guilty of the matters in said indictment charged upon him, by the jury impannelled to try the same, and who, by their verdict, said the said G. H. should be confined in the penitentiary for the term of two years, and it was thereupon adjudged by the said circuit court that the said G. H., for the said offence, should be imprisoned in the penitentiary at Alton for the said term of two years, and was thereupon, on the day of 18 delivered to W. R., Esquire, sheriff of the said county of La Salle, in execution of said judgment; and that, afterwards, to wit, on the day of 18 in the county aforesaid, and whilst the said G. H. was in the custody of the said sheriff for the cause aforesaid, C. D. in and upon the said W. R., Esquire, sheriff as aforesaid, did make an assault, and him, the said G. H., unlawfully and forcibly from the custody of the said sheriff did rescue and put at large to go whithersoever he would. (Conclude as before, page 70.)

Another form.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, G. H., who had been convicted of the crime of burglary and sentenced to imprisonment in the penitentiary at Alton, was in the custody of W. R., Esquire, sheriff of said county; and whilst the said G. H. was in custody as aforesaid, afterwards, to wit, on the day of 18 in the county aforesaid, C. D. out of the custody of the said sheriff unlawfully and forcibly the said G. H. did res-

cue and put at large to go where he would. (Conclude as before, page 70.)

For a rescue before conviction. Crim. Code, Sec. 94.

(Commence as before, page 70;) that G. H., on the day of 18 had been arrested by A. B., one of the constables of the said county, and was then in the legal custody of the said A. B. as such constable, in the county aforesaid, on a charge for an assault and battery, committed by the said G. H. upon E. F.; and C. D., well knowing the said G. H. so to be arrested, afterwards, to wit, on the said day of 18 in the county aforesaid, the said G. H. unlawfully and forcibly did rescue and put at large. (Conclude as before, page 70.)

For assisting a prisoner confined in jail to escape. Crim. Code, Sec. 99.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. did unlawfully aid and assist one G. H., who was lawfully committed to and detained in the common jail of the said county, situate in the town of Ottawa, for an offence against this state, that is to say, for feloniously stealing, taking, and carrying away a certain horse, the property of the said A. B., to make his escape from the said jail, although the said G. H. did not actually escape. (Conclude as before, page 70.)

For conveying a disguise to a person in jail to facilitate his escape.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. did feloniously convey a certain disguise, to wit, a woman's apparel, to G. H., who was lawfully committed to and detained in the common jail of the said county, in Ottawa, for a certain felony by him committed, that is to say, for feloniously passing, as true and genuine, ten counterfeit pieces of the silver coin of the United States, current in this state, called half dollars, knowing the same to be counterfeit, with intent to defraud one E. F., with intent thereby to facilitate the escape of the said G. H. (Conclude as before, page 70.)

For the voluntary escape of a prisoner before conviction—against an officer. Crim. Code, Sec. 101.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D., being keeper of the common jail of the said county and then and there having in his legal custody in said jail one G. H. on a charge of having committed a felony, to wit, for feloniously stealing, taking, and carrying away ten hats, the property of one I. F., did voluntarily suffer and permit the said G. H. to escape and go at large whithersoever he would. (Conclude as before, page 70.)

For an officer refusing to arrest a person charged with a criminal offence. Crim. Code, Sec. 102.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, G. H. was charged upon oath before L. M., Esquire, a justice of the peace of said county, with having committed a criminal offence, to wit, for passing four counterfeit bank bills, purporting to have been issued by the State Bank of Indiana, a corporation for that purpose duly authorized by the laws of the state of Indiana, for the payment of five dollars each, knowing the same to have been counterfeited, with intent to defraud one A. B., for which offence the said L. M., Esquire, then and there issued a warrant, directed to all sheriffs, coroners, and constables of said state, requiring them to take the said G. H. and bring him before the said L. M., Esquire, which said warrant was afterwards, to wit, on the day of 18 in the county aforesaid, delivered to C. D., then one of the constables of the said county of La Salle, to be by him executed, and that the said C. D. then and there wilfully refused to arrest the said G. H. (Conclude as before, page 70.)

For compounding a criminal offence. Crim. Code, Sec. 103.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, E., the wife of G. H., feloniously stole, took, and carried away one silver spoon of the goods and chattels of C. D.; and that the said C. D., knowing the said felony to have been committed, afterwards, to wit, on the day of 18 in the county aforesaid, contriving and intending, unlawfully and unjustly, to prevent the due course of law and justice in this behalf, and to cause and procure the said E., for the felony aforesaid, to escape with impunity, unlawfully and for the sake of gain did compound the said felony with the said G. H., the husband of the said E., and did then and there exact and receive of the said G. H.

ten dollars as a reward for compounding said felony and desisting from all further prosecution against the said E. (Conclude as before, page 70.)

For embracery by persuading a juror to give his verdict in favor of the defendant. Crim. Code, Sec. 107.

Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D., knowing that a jury of the said county of La Salle was then duly returned, impannelled, and sworn to try a certain issue joined in the circuit court then held according to law at Ottawa, in and for the county of La Salle aforesaid, between E. F., plaintiff, and G. H., defendant, in a plea of trespass on the case upon promises, and then also knowing that a trial was to be had upon the said issue, on the day of in the year aforesaid, before said circuit court then and there held for the county aforesaid, the said C. D., devising wickedly and unlawfully to hinder the due and lawful trial of the said issue by the jurors aforesaid, returned, impannelled and sworn as aforesaid, to try the said issue, on the day of in the year aforesaid, at Ottawa, in the county aforesaid, unlawfully, wickedly, and unjustly, on behalf of the said G. H., the defendant in said cause, did solicit and persuade one I. J., one of the jurors of the said jury, returned, impannelled, and sworn according to law for the trial of said issue, to appear and attend in favor of the said G. H., the said defendant, and then and there did say and utter to the said I. J., one of the jurors as aforesaid, divers words and discourses, by way of commendation on behalf of him, the said G. H., the said defendant, and disparagement of the said E. F., the plaintiff, to influence the said I. J., one of the jurors as aforesaid, to give a verdict for the said G. H., the defendant. (Conclude as before, page 70.)

For common barratry. Crim. Code, Sec. 107.

(Commence as before, page 70;) that C. D., of the county of La Salle, on the day of 18 and on divers other days and times, as well before as afterwards, was and yet is a common barrator; and that he, the said C. D., on the said day of 18 and on divers other days and times, in the county aforesaid, divers quarrels, strifes, suits, and controversies among the honest and quiet citizens of this state then and there did wickedly and wilfully stir up and excite, with a view to promote strife and contention. (Conclude as before, page 70.)

For maintenance. Crim. Code, Sec. 108.

(Commence as before, page 70;) that C. D., on, &c., at, &c., in the county aforesaid, did officiously intermeddle in a certain suit that in no wise belonged to or concerned the said C. D., which was then depending in the circuit court in the county of La Salle, between E. F., plaintiff, and G. H., defendant, in a plea of debt, by maintaining and assisting the said E. F., the plaintiff, with money to prosecute his said suit, with a view to promote litigation. (Conclude as before, page 70.)

For extortion—against a justice for taking greater fees than are legally due. Crim. Code, Sec. 109.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D., then an acting justice of the peace in and for the said county, in a certain suit then lately tried and determined before the said C. D. as such justice, wherein A. B. was plaintiff and G. H. defendant, and wherein judgment was rendered against the said G. H., C. D. did, by color of his said office, willfully and corruptly extort, receive, and take of and from the said G. H., the defendant, the sum of fifty cents, under pretence that the same was due to him as his fee for issuing the summons in said case, whereas, in truth and in fact, the sum of eighteen cents and three fourths only was legally due from the said G. H. to the said C. D. as such justice of the peace for his said service in issuing said summons. (Conclude as before, page 70.)

For extortion—against a constable for exacting money as a fee not legally due.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. then and there being one of the constables of the said county, did take and arrest A. B. by color of a certain warrant, commonly called a bench warrant, which he, the said C. D., then and there alledged to be in his possession, and afterwards, and whilst the said A. B. so remained in his custody, the said C. D., to wit, on the day and in the county aforesaid, did, willfully, corruptly, and extorsively, and by color of his said office, extort, receive, and take of and from the said A. B. the sum of three dollars as and for a fee due to him, the said C. D., as such constable, as he alleged, whereas, in truth and in fact, no fee was due to the said C. D. from the said A. B. in that behalf. (Conclude as before, page 70.)

For extortion—against a constable for exacting a greater fee than is legally due.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D., being one of the constables of the said county, had in his possession an execution, issued by L. M., Esquire, a justice of the peace in and for the said county, in favor of E. F., against G. H., by which execution the said C. D., as constable as aforesaid, was commanded to make, of the goods and chattels of the said G. H., the sum of twenty dollars debt and two dollars costs; and afterwards, to wit, on the day and in the county aforesaid, the said C. D., by color of his said office, did, willfully, corruptly, and extorsively, demand, take, and receive of and from the said G. H. as a fee for his services in collecting the amount due on the said execution, the sum of five dollars, whereas, in truth and in fact, the sum of two dollars only was legally due from the said G. H. to the said C. D. as such constable as aforesaid in that behalf. (Conclude as before, page 70.)

OFFENCES AGAINST THE PUBLIC PEACE AND TRANQUILLITY.

For disturbing the peace. Crim. Code, Sec. 112.

(Commence as before, page 70;) that C. D. and E. F., together with divers other persons, to the said A. B. unknown, at in the county aforesaid, at a late and unusual hour of the night, of the day of 18 unlawfully and wilfully did assemble and meet together, and being so assembled and met together, did then and there unlawfully and wilfully, by loud and unusual noises, disturb the peace and quiet of the family of the said A. B. (Conclude as before, page 70.)

For assembling to disturb the peace and not dispersing on being commanded. Crim. Code, Sec. 113.

(Commence as before, page 70;) that C. D. and E. F., (and divers other persons to the said A. B. unknown,) on the day of 18 at in the county aforesaid, did unlawfully assemble and meet together for the purpose of disturbing the public peace, and that afterwards, to wit, on the same day and at the place aforesaid, L. M., Esquire, one of the justices of the peace of the said county, desired and

commanded all persons then and there assembled immediately to disperse, and, notwithstanding the said desire and command of the said L. M., Esquire, justice of the peace as aforesaid, the said C. D. and E. F. (and said divers other persons) did then and there unlawfully, riotously, and tumultuously, and to the disturbance of the public peace, remain and continue together for the space of one hour after such desire and command made by the said L. M., Esquire, justice as aforesaid. (Conclude as before, page 70.)

For an unlawful assembly. Crim. Code, Sec. 115.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. and E. F. unlawfully did assemble together to pull down, remove, and destroy a certain dwelling house in the possession of the said A. B., and, having so assembled for the purpose aforesaid, did separate without doing or advancing towards it. (Conclude as before, page 70.)

For a rout. Crim. Code, Sec. 116.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. and E. F., upon a common cause of quarrel, unlawfully and routously did assemble together to break, pull down, and remove the fences upon the land then and there in the peaceable possession of the said A. B., and then and there unlawfully and routously did advance to break, pull down, and remove said fences. (Conclude as before, page 70.)

For a riot. Crim. Code, Sec. 117.

(Commence as before, page 70;) that, on this present day, at in the county aforesaid, C. D. and E. F. did unlawfully and riotously assemble together to disturb the peace, and, being so assembled together, in and upon the said A. B., with force and violence, did make an assault, and him, the said A. B., then and there did beat, wound, and ill treat. (Conclude as before, page 70.)

Another form.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. and E. F. (*together with divers other persons to the said A. B. unknown*) unlawfully and riotously did assemble together to disturb the peace, and being so assembled together, a certain building and outhouse,

in the possession and lawful occupation of the said A. B., then and there, with force and violence, did break, pull down, remove, and destroy. (Conclude as before, page 70.)

Another form.

(Commence as before, page 70;) that on the day of last, at in the county aforesaid, C. D. and E. F. did, unlawfully and riotously, assemble together to disturb the peace, and, being so assembled together, the dwelling house of the said A. B. there situate, then and there, with force and violence, did break and enter, and then and there, with force and violence, put, cast, and throw divers goods and chattels of the said A. B., to wit, (*here set out the goods,*) then being in the said dwelling house, from and out of the same. (Conclude as before, page 70.)

OFFENCES AGAINST THE PUBLIC MORALITY, HEALTH, AND POLICY.

For bigamy—against the husband. Crim. Code, Sec. 121.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D., being then married and then the husband of E. D., feloniously did marry and take to wife L. M., the said E. D., his former wife, being then alive. (Conclude as before, page 70.)

For bigamy—against the wife.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, E. D., being then married and then the wife of C. D., feloniously did marry and take to husband L. M., the said C. D., her former husband, being then alive. (Conclude as before page 70.)

For a single person marrying the wife of another. Crim Code, Sec. 122.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D., being then unmarried, feloniously and knowingly did marry and take to wife L. M., being then married and then the wife of G. M. (Conclude as before, page 70.)

For incest. Sess. Laws of 1842–3, page 155.

(Commence as before, page 70;) that on the day of last, at in the county aforesaid, C. D. did feloniously intermarry with G. D., then being sister of the said C. D. (Conclude as before, page 70.)

Against a father cohabiting with his daughter. Sess. Laws of 1842–3, page 155.

(Commence as before, page 70;) that on the day of last, at in the county aforesaid, C. D. did, rudely and licentiously, cohabit with G. D., his daughter. (Conclude as before, page 70.)

For living in an open state of adultery. Crim. Code, Sec. 123.

(Commence as before, page 70;) that C. D., on the day of instant, and for a long time previous thereto, to wit, for three months previous thereto, at in the county aforesaid, did, wrongfully and lewdly, in an open state of adultery, live with G. H., the wife of E. H., who was during all that time alive. (Conclude as before, page 70.)

For living in an open state of fornication. Crim. Code, Sec. 123.

(Commence as before, page 70;) that on the day of instant, and for a long space of time previous thereto, to wit, for the space of two months previous thereto, at in the county aforesaid, C. D. did, wrongfully, lewdly, and lasciviously, in an open state of fornication, live with a certain woman named G. H. (Conclude as before, page 70.)

For keeping a disorderly house. Crim. Code, Sec. 125.

(Commence as before, page 70;) that on the day of last, and from thence to this present day, at in the county aforesaid, C. D. did keep and maintain, and still keeps and maintains, a certain common, ill-governed, and disorderly house, for his own lucre and profit, where persons assemble, by his encouragement and permission, and there remain gaming. (Conclude as before, page 70.)

For open lewdness. Crim. Code, Sec. 125.

(Commence as before, page 70;) that C. D., on the day of instant, at it the county afore-

said, was guilty of open lewdness, by openly, grossly, lewdly, and lasciviously lying on a bed with one E. F., a single woman, for the space of four hours. (Conclude as before, page 70.)

For keeping a lewd house. Crim. Code, Sec. 125.

(Commence as before, page 70;) that on the day of 18 and from thence until the present time, at in the county aforesaid, C. D. unlawfully did, and still does, keep and maintain a certain common lewd house, and in said house certain evil-disposed persons, as well men as women of dishonest conversation, did cause and procure to frequent and come together, and in the said house unlawfully did permit the said men and women, as well in the night as in the day, to remain in the practice of fornication. (Conclude as before, page 70.)

For keeping an open tippling house on the Sabbath.

(Commence as before, page 70;) that C. D., on the day of instant, it being the first day of the week, commonly called the Sabbath, at in the county aforesaid, unlawfully and wilfully, did keep open a certain tippling house, and for his own lucre and gain, in the said house, did procure and permit certain evil and ill-disposed persons to remain drinking and tippling. (Conclude as before, page 70.)

For keeping a common gaming house. Crim. Code, Sec. 126.

(Commence as before, page 70;) that C. D., on the day of last, and on divers other days and times, as well before as afterwards, at in the county aforesaid, a certain common gaming house there situate, for his gain and profit, unlawfully and injuriously, did exercise, have, keep, and maintain, and in the said common gaming house, on the said day of and on the said other days and times, there unlawfully and injuriously did procure and permit divers persons to frequent and come together to play for money at a certain unlawful game called billiards. (Conclude as before, page 70.)

For obstructing the public highway. Crim. Code, Sec. 131.

(Commence as before, page 70;) that on the day of 18 and on divers other days and times, as well before as afterwards, at in the county

aforesaid, the public highway there, leading from Ottawa unto the town of La Salle, C. D. did obstruct and render inconvenient (or "dangerous") to pass, that is to say, divers large pieces of timber then and there put and placed, and caused to be put and placed, and the same obstruction from the said day of aforesaid, until the day of exhibiting this charge, in and upon the said public highway to be and remain has permitted and still does permit. (Conclude as before, page 70.)

For obstructing a common street. Crim. Code, Sec. 131.

(Commence as before, page 70;) that on day of 18 and on divers other days and times, as well before as afterwards, at *Ottawa*, in the county aforesaid, the common street in the town of Ottawa, called Columbus street, C. D. did obstruct and render inconvenient to pass, that is to say, divers cartloads of filth and rubbish then and there did put and place, and caused to be put and placed, to the great inconvenience of the citizens of the said town and of the said state, so that they could not freely pass and repass along the said street, and from the said day of aforesaid, until the day of exhibiting this charge, has permitted and still does permit the said obstruction to be, lie, and remain. (Conclude as before, page 70.)

For selling unwholesome provisions. Crim. Code, Sec. 132.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. did knowingly sell to the said A. B. a quantity of diseased and unwholesome provisions for meat, that is to say, one hundred pounds of the flesh of a diseased ox, knowing the said ox to have been diseased, and without making it known to the said A. B. (Conclude as before, page 70.)

Another form.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. did knowingly sell to the said A. B. a certain quantity of diseased and unwholesome provisions for meat, that is to say, one hundred pounds of diseased and unwholesome pork, knowing the same to be diseased and unwholesome, and without making it known to the said A. B. (Conclude as before, page 70.)

For defacing notices. Crim. Code, Sec. 134.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, A. B., one of the constables of the said county, had in his hands an execution issued by L. M., Esquire, a justice of the peace of said county, upon a judgment then lately entered by him in favor of E. F., plaintiff, against G. H., defendant, by which execution the said A. B., constable as aforesaid, was commanded to make of the goods and chattels of the said G. H. the sum of thirty dollars debt and two dollars costs, and, for the purpose of making the same, the said A. B., constable as aforesaid, by virtue of said execution, afterwards, to wit, on the day of 18 levied upon the goods and chattels of the said G. H., and afterwards, on the same day and in the county aforesaid, appointed the day of at o'clock in the noon, as the time for the sale, by advertisement thereof in writing, posted up at three of the most public places in said county, one of which advertisements was posted on the outer door of the house of I. J., inn keeper in said county; that on the day of 18 C. D. did intentionally tear down and destroy the said advertisement so posted up, before the expiration of the time for which by law it was to remain so posted up. (Conclude as before, page 70.)

For having tools to break into a dwelling house, &c. Crim. Code, Sec. 136.

(Commence as before, page 70;) that, on the night of the day of 18 near the store occupied by A. B., containing valuable property, situate in the town of Ottawa, in the said county, C. D. was found having upon him and in his possession a pick-lock, crow, and bit, with intent then and there feloniously to break and enter the said store. (Conclude as before, page 70.)

For having weapons with intent to assault, &c. Crim. Code, Sec. 136.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. had in his possession and upon him a certain offensive weapon, to wit, a pistol, with intent to assault the person of the said A. B. (Conclude as before, page 70.)

For disinterring the dead. Crim. Code, Sec. 138.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. did, unlawfully and indecently, open the grave where the body of G. H., deceased, had then lately been deposited, and the body of the said G. H., deceased, from the said grave did then and there remove for the purpose of dissection, without the knowledge and consent of the near relations of the said deceased. (Conclude as before, page 70.)

For voting more than once at an election. Crim. Code, Sec. 139.

(Commence as before, page 70;) that, at a general election held on the first Monday of August last, (it being the day of August,) in and for the county of *La Salle*, in the several precincts of the said county, for the purpose of electing county officers, C. D., being an elector in said county, did appear at the place of holding said election, in *Ottawa* precinct, and did then and there vote for, and mention by name, E. F. as the person whom he intended to vote for, to fill the office of sheriff of said county, to be filled at said election, and cause his name and vote to be entered by the clerks of said election, in said precinct, for the said E. F. for sheriff as aforesaid, and the said C. D., being a person regardless of the rights of the people and the freedom and purity of elections in this state, afterwards, on the said first Monday of August last, did appear at the place of holding said election in precinct, in said county, and did then and there again vote for, and mention by name, the said E. F. as the person he intended to vote for, to fill the office of sheriff, to be filled at said election and cause his name and vote to be entered by the clerks of said election for the said E. F., for the office of sheriff as aforesaid, contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

OFFENCES COMMITTED BY CHEATS, SWINDLERS, AND OTHER FRAUDULENT PERSONS.

For fraudulently conveying property, &c. Crim. Code, Sec. 141.

(Commence as before, page 70;) that, on the day of 18 at in the county aforesaid, C. D., being the

owner in fee of a certain tract of land, situate, lying, and being in the said county, bounded and described as follows, to wit, (describe the land,) and being then and there indebted to the said A. B. in a large sum of money, to wit, the sum of one hundred dollars, for the collection of which the said A. B. had then lately commenced a suit in the circuit court of *La Salle* county, against the said C. D., he, the said C. D., did, unlawfully and fraudulently, convey the said land to G. H., with intent to hinder, delay, and defeat the said A. B. in the collection of his said debt. (Conclude as before, page 70.)

For swindling. Crim. Code, Sec. 142.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D., by a certain false representation, to wit, that he was worth the sum of five thousand dollars after the payment of every debt he owed, thereby obtained a credit of one month for the price of divers goods and chattels, to wit, five horses of the value of three hundred dollars, then and there sold and delivered to him by the said A. B., with intent then and there to defraud the said A. B. of the same, when in fact the said C. D., then and there, as he well knew, was entirely insolvent and unable to pay for said horses, and by the said false representations, and obtaining the credit aforesaid, the said C. D. did defraud the said A. B. of the said goods and chattels. (Conclude as before, page. 70.)

For obtaining goods, &c., by false pretences. Crim. Code, Sec. 143.

Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D., knowingly and designedly, by a certain false pretence, to wit, by falsely pretending that G. H. had in his hands a large sum of money belonging to him, he, the said C. D., did obtain from the said A. B. divers goods and chattels, to wit, ten cows and six oxen, by giving in payment for the same his order upon the said G. H., whereby he required the said G. H. to pay to the said A. B. the sum of one hundred and fifty dollars, one week after the date thereof, with intent thereby to cheat and defraud the said A. B., when, in fact, the said G. H. had no money in his hands belonging to the said C. D., and did not and would not pay the said order when it became due, or at any other time. (Conclude as before, page 70.)

For fraudulently selling land a second time. Crim. Code, Sec. 144.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. did enter into an agreement in

writing with G. H., to sell and convey to the said G. H., for the consideration of five hundred dollars, to be paid three months after the date of the said agreement, all that certain piece or parcel of land situate in said county, and bounded as follows, to wit, (*here describe the land,*) and that afterwards, to wit, on the day of 18 and while the said agreement was in force, in the county aforesaid, for the consideration of five hundred dollars, he, the said C. D., did, knowingly and fraudulently, dispose of and convey the same land to the said A. B., contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

For selling by false weights, &c. Crim. Code, Sec. 145.

(Commence as before, page 70;) that, on the day of 18 and from thence until the time of making this charge, C. D. was a grocer, engaged in buying and selling divers goods, wares, and merchandizes, and did keep in his shop false weights for weighing goods, wares, and merchandizes by him sold, which caused them to appear of greater weight, to wit, of a greater weight by one ounce in every pound of goods weighed, than the real and true weight thereof, and during that time did then and there, knowingly sell to divers citizens of this state divers goods, wares, and merchandizes weighed with said false weights. (Conclude as before, page 70.)

FRAUDULENT AND MALICIOUS MISCHIEF.

For destroying a bridge, &c. Crim. Code, Sec. 146.

(Commence as before, page 70;) that, on the day of 18 C. D. did, wilfully and maliciously, and for mischief, cut down a certain common bridge then being over the Fox river, commonly called the Geneva bridge, lying and being in the county of Kane; contrary to the form of the statute in such case made and provided. (Conclude as before, page, 70.)

Another form.

(Commence as before, page 70;) that C. D., on, &c., at, &c., in the county aforesaid, three stacks of hay, of the value of twenty dollars, the property of the said A. B., willfully and

maliciously, and for mischief, did set fire to, burn, and destroy; contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

For suspicion of girdling fruit trees. Crim. Code, Sec. 146.

(Commence as before, page 70;) that, on the day of 18 a large number of fruit trees, to wit, twenty apple trees, standing and growing upon the lands of the said A. B., situate at in the county aforesaid, were, for mischief, wilfully and maliciously girdled; and that he, the said A. B., has just and reasonable grounds to suspect, and does suspect, that C. D. did, wilfully and maliciously, and for mischief, girdle the same. (Conclude as before, page 70.)

For maliciously killing an ox, &c. Crim. Code, Sec. 146.

(Commence as before, page 70;) that, on the day of 18 at in the county aforesaid, C. D. did, unlawfully, wilfully, and maliciously, and for mischief, kill a certain ox belonging to the said A. B. (Conclude as before, page 70.)

For suspicion of maliciously disfiguring a horse.

(Commence as before, page 70;) that, on the day of 18 at in the county aforesaid, a certain horse of him, the said A. B., was, for mischief, wantonly and maliciously disfigured, that is to say, the ears, mane, and hairs of the tail of the said horse were cut off; and that he, the said E. B., has just and reasonable grounds to suspect, and does suspect, that C. D. did, unlawfully, wantonly, and maliciously, disfigure the said horse. (Conclude as before, page 70.)

For setting on fire prairie, &c. Crim. Code, Sec. 148.

(Commence as before, page 70;) that, on the day of 18 C. D. did, wilfully and intentionally, set on fire the prairie in Eagle precinct, in the county of *La Salle*, in an inhabited part of this state; contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

OFFENCES RELATIVE TO SLAVES, INDENTURED SERVANTS, AND APPRENTICES.

For harboring or secreting slaves, &c. Crim. Code, Sec. 149.

(Commence as before, page 70;) that on, &c., at, &c., in the county aforesaid, C. D. did unlawfully harbor (or "secrete") a negro, called and known by the name of R. S., the same being a slave (or "servant") owing service to A. B., a resident of the state of Missouri, within the limits and under the jurisdiction of the United States; contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

For taking a negro out of the state, &c. Crim. Code, Sec. 150.

(Commence as before, page 70;) that, on the day of 18 C. D. being entitled to the service of R. S., a negro, by indenture entered into under the laws of the late territory of Illinois, and having a right to hold such negro in temporary servitude by virtue of those laws and the constitution of this state, before the expiration of the term of service of said negro, did hire out the said negro to G. H., a resident of the state of Mississippi, to live and reside in said state; contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

For keeper of public house harboring, &c., an apprentice, &c. Crim. Code, Sec. 151.

(Commence as before, page 70;) that, on the day of 18 and for divers days since, C. D., the keeper of a public house, at in the county aforesaid, did entertain at his house R. S., who is within the age of twenty one years and an apprentice to the said A. B., after having been cautioned to the contrary by the said A. B. in the presence of E. F., a credible witness, the said C. D. then and there knowing the said R. S. to be an apprentice; contrary to the form of the statute in such case made and provided. (Conclude as before, page 70.)

CHAPTER VIII.

FORMS OF COMMITMENTS FOR FURTHER EXAMINATION—SUMMONS, WARRANTS, AND COMMITMENTS OF WITNESSES—RECOGNIZANCE TO APPEAR—MITTIMUS—RECOGNIZANCE TO GIVE EVIDENCE—COMMITMENT OF WITNESSES—RECOGNIZANCE AFTER COMMITMENT—AND LIBERATE.

FORMS OF COMMITMENTS FOR FURTHER EXAMINATION.

Commitment for further examination.

State of Illinois, }
La Salle county, } ss. To the keeper of the common jail of the said county:

Receive into your custody and safely keep for further examination C. D., who is charged before me with having stolen, taken, and carried away a horse, the property of one A. B. Given under the hand and seal of the said justice, this day of 18 *Seth B. Farwell,* [L. S.]
Justice of the peace.

The like in another form.

State of Illinois, }
La Salle county, } ss. To any constable of the said county, and the keeper of the common jail of said county:

Whereas, C. D. is now brought before *Seth B. Farwell,* Esquire, a justice of the peace of the said county, upon a charge under oath of having passed as true and genuine ten counterfeit pieces of the silver coin of the United States, current in this state, called half dollars, with intent to defraud A. B. These are, therefore, in the name of the people of the state of Illinois, to command you, the said constable, to convey the said C. D. to the common jail of said county and deliver him to the keeper thereof; and you, the said keeper, are hereby required to receive and safely keep the said C. D. in your custody in said jail for further examination, and until he shall be discharged by due course of law. Given under the hand and seal of the said justice, this day of 18
Seth B. Farwell. [L. S.]

Order to bring up a prisoner for examination.

State of Illinois, }
La Salle county, } ss. To the keeper of the common jail of the said county:

You are hereby required to bring C. D., a prisoner in your custody, to my office in *Ottawa*, in said county, for further examination. Given under my hand and seal, this day of 18 *Seth B. Farwell*, [L. S.]
Justice of the peace.

SUMMONSES, WARRANTS, AND COMMITMENTS OF WITNESSES.

Summons for a witness to give evidence.

State of Illinois, }
La Salle county, } ss. To any constable of the said county:

Whereas, complaint has been made by A. B. before *Seth B. Farwell*, Esquire, a justice of the peace of said county, that (*set forth the offence as in the warrant*) and an information given that G. H. is a material and necessary witness to be examined concerning the same; these are, therefore, in the name of the people of the state of Illinois, to require you to summon the said G. H. to appear before the said justice at his office at *Ottawa*, in the said county, forthwith, (or on the day of instant, at o'clock in the noon") to testify the truth, according to his knowledge, concerning the premises. Given under the hand and seal of the said justice, this day of 18
Seth B. Farwell. [L. S.]

The like in another form.

State of Illinois, }
La Salle county, } ss. To G. H. and L. M.:

These are, in the name of the people of the state of Illinois, to will and require you, and each of you, personally to be and appear before the undersigned, a justice of the peace of the said county, at his office in *Ottawa*, in the said county, forthwith, (or "on the day of instant, at o'clock in the noon") to testify the truth, according to your knowledge, concerning a certain charge made before me

by A. B. against C. D. for larceny. Given under the hand and seal of the said justice, the day of 18

Seth B. Farwell. [L. S.]

Summons for a witness where two justices are required to be associated to take the examination.

State of Illinois, }
La Salle County, } ss. To any constable of said county:

Whereas, complaint has been made by A. B. before *Seth B. Farwell*, Esquire, a justice of the peace of said county, that (*here set forth the offence as in the warrant*) and information given that G. H., I. J., K. L., and M. N. are material and necessary witnesses to be examined concerning the same.

These are, therefore, in the name of the people of the state of Illinois, to command and require you to summon the said G. H., I. J., K. L., and M. N. to appear before the said justice, and some neighboring justice to be by him associated with himself, (or "and Jabez Fitch, Esquire, a neighboring justice to be associated by the said justice with himself,") at the office of the said *Seth B. Farwell*, Esquire, in *Ottawa*, in said county, forthwith, (or "on the day of 18 at o'clock in the noon,") to testify the truth according to their knowledge concerning the premises. Given under the hand and seal of the said *Seth B. Farwell*, Esquire, the day of 18

Seth B. Farwell. [L. S.]

The like when issued by two justices.

State of Illinois, }
La Salle County, } ss. To any constable of the said county:

Whereas, complaint has been made by A. B. before *Seth B. Farwell*, Esquire, a justice of the peace of said county, that (*here set forth the offence as in the warrant*) and information given that G. H. is a material and necessary witness to be examined concerning the same.

These are, therefore, in the name of the people of the state of Illinois, to command and require you to summon the said G. H. to appear before the said *Seth B. Farwell*, Esquire, and *Jabez Fitch*, Esquire, a neighboring justice associated with him, at the office of the said *Seth B. Farwell*, Esquire, forthwith, (or "on the day of 18 at o'clock in the noon,") to testify the truth according to his knowledge concerning the premises. Given under the hands and seals of the said justices, the day of 18

Seth B. Farwell, [L. S.]
Jabez Fitch. [L. S.]

Warrant for a witness in a case of felony.

State of Illinois, }
La Salle County, } ss. To any constable of said county:

Whereas, oath hath been made before *Seth B. Farwell*, Esquire, a justice of the peace of the said county, by A. B., that a horse of the said A. B. was lately stolen, taken, and carried away, at in the county aforesaid, and that he has good cause to believe that G. H. is a material witness to prove by whom the said larceny was committed. These are, therefore, in the name of the people of the state of Illinois, to require you to cause the said G. H. forthwith to come before the said justice to give such information and evidence as he knoweth concerning said felony. Given under the hand and seal of the said justice, this day of 18

Seth B. Farwell. [L. S.]

Warrant against a witness who has refused to attend on summons.

State of Illinois, }
La Salle County, } ss. To any constable of said county:

These are, in the name of the people of the state of Illinois, to command you, upon sight hereof, to take G. H. and bring him before the subscriber, a justice of the peace of the said county, to answer all such matters and things as, on the behalf of the said people, are on oath objected against him by A. B., for that he, the said G. H., being a material witness to prove a certain felony lately committed, and, having been duly summoned to give evidence touching the same, hath neglected to appear in pursuance of said summons. Given under the hand and seal of the said justice, this day of 18

Seth B. Farwell. [L. S.]

Commitment of a witness for refusing to give evidence.

State of Illinois, }
La Salle County, } ss. To any constable of the said county, and to the keeper of the common jail of the said county:

These are, in the name of the people of the state of Illinois, to command you, the said constable, forthwith to convey and deliver into the custody of the said keeper the body of G. H., this day brought before the subscriber, one of the justices of the peace of said county, for that he, the said G. H., having knowledge that a certain felony and larceny was committed in the county aforesaid, that is to say, that a certain horse, the property of the said A. B., was feloniously stolen, taken, and carried away by C. D., on the day of

last, touching which the said G. H. can give material evidence, has refused to be examined on oath respecting the same; and you, the said keeper, are hereby required to receive the said G. H. into your custody in the said jail, and him there safely keep until he shall submit to be examined touching the said felony, or shall be discharged by due course of law. Given under the hand and seal of the said justice, this day of 18 *Seth B. Farwell.* [L. S.]

Oath of complainant or witness on the examination.

You do swear by the ever living God, that the evidence you shall give between the people of the state of Illinois and C. D., touching the charge exhibited against him now in hearing, shall be the truth, the whole truth, and nothing but the truth: so help you God.

Form of affirmation.

You do solemnly, sincerely, and truly declare and affirm, that the evidence that you shall give, between the people of the state of Illinois and C. D., touching the charge exhibited against him now in hearing, shall be the truth, the whole truth, and nothing but the truth: and this you do under the pains and penalties that may ensue thereon.

RECOGNIZANCES FOR THE APPEARANCE OF PRISONERS.

Recognizance of a prisoner.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 C. D., of in the county aforesaid, and E. F. and G. H., of in the county aforesaid, personally came before *Seth B. Farwell*, Esquire, a justice (if taken by two justices, then say "before us, two of the justices") of the peace of the said county, and severally and respectively acknowledged themselves to owe the people of the state of Illinois, that is to say, the said C. D. the sum of *two hundred* dollars, and the said E. F. and G. H. each the sum of *one hundred* dollars, separately to be made and levied of their respective goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the condition following:

The condition of this recognizance is such, that, if the said C. D. shall personally be and appear at the next term of the circuit court to be held in and for the said county of *La Salle*, on the first day thereof, to answer to an indictment to be preferred against him for (*here set forth the offence briefly,*) and to do and receive what shall by the court be than and there enjoined upon him, and shall not depart the court without leave, then this recognizance to be void, or else to remain in full force.

C. D.
Taken, subscribed, and acknowledged the day and year first above written, before *Seth B. Farwell.* } E. F. G. H.

Recognizance of two prisoners.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 C. D. and J. K., of in the county aforesaid, and E. F. and G. H., of in the county aforesaid, personally came before *Seth B. Farwell*, Esquire, a justice (if taken by two justices, then say "before us, two justices") of the peace of the said county, and severally acknowledged themselves to owe to the people of the state of Illinois, that is to say, the said C. D. and J. K. the sum of *three hundred* dollars each, and the said E. F. and G. H. the sum of *one hundred and fifty* dollars each, to be respectively levied of their several goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the condition following:

The condition of this recognizance is such, that, if the above bounden C. D. and J. K. shall personally be and appear at the next term of the circuit court, to be held in and for the said county of *La Salle*, on the first day thereof, then and there to answer to an indictment to be preferred against them for (*here state the offence briefly,*) and to do and receive what shall, by the court, be then and there enjoined upon them, and shall not depart the court without leave, then this recognizance to be void, or else to remain in full force.

C. D.
Taken, subscribed, and acknowledged the day and year above written, before *Seth B. Farwell.* } J. K. E. F. G. H.

Form of recognizance by an infant or married woman.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 E. F. and G. H., of the county aforesaid, personally came before *Seth B. Farwell*, Esquire, a justice of the peace of the said county, and severally and respect-

ively acknowledged themselves to owe to the people of the state of Illinois, the sum of dollars, to be levied of their respective goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the condition following:

The condition of this recognizance is such, that, if I. J., who is an infant, (or "a married woman,") shall personally appear, (as in the preceeding forms.)

MITTIMUS.

The statement of the offence, which is inclosed in brackets in the following forms, must be adapted to the actual case by taking it in substance from the warrant on which the offender was arrested.

Form of mittimus by one justice for an offence not bailable.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county, and to the keeper of the common jail of the said county:

Whereas, C. D. has been arrested and this day brought before *Seth B. Farwell*, Esquire, one of the justices of the peace of the said county, charged on the oath of A. B. with [having feloniously, wilfully, and of malice aforethought, killed and murdered G. H., at in the county aforesaid, who was on the day of instant, there found dead;] and having inquired into the truth and probability of the charge exhibited against him, by the oath of all witnesses attending, and upon consideration of the facts and circumstances proved, the said justice did adjudge that the said offence had been committed, and did further adjudge the said C. D. to be guilty of having committed the said felony and murder. We, therefore, command you, the said constable, forthwith to convey the said C. D. to the common jail of the said county, and him deliver to the keeper thereof; and you, the said keeper, are hereby required to receive the said C. D. into your custody in the said jail, and him there safely keep until he shall be discharged by due course of law. Witness, the said *Seth B. Farwell*, Esquire, at in the county of *La Salle*, the day of 18 *Seth B. Farwell.*

Form of mittimus by one justice for a bailable case.

State of Illinois, }
La Salle County, } ss. The people of the state of Illinois to any constable of said county, and to the keeper of the common jail of the said county:

Whereas, C. D. has been arrested and this day brought before *Seth B. Farwell*, Esquire, one of the justices of the peace of the said county, charged, on the oath of A. B., with [suspicion of feloniously stealing, taking, and carrying away, at in the county aforesaid, on the day of instant, one sorrel horse, of the value of fifty dollars, the property of the said A. B., which was then and there stolen;] and having enquired into the truth and probability of the charge exhibited against him by the oath of all witnesses attending, and upon consideration of facts and circumstances, the said justice did adjudge that the said offence had been committed, and that there was probable cause to believe the said C. D. to be guilty thereof, and required him to enter into a recognizance, with good and sufficient sureties, in the sum of *two hundred and fifty* dollars, for his personal appearance at the next term of the circuit court to be held in and for the county of *La Salle*, on the first day thereof, with which requisition he has failed to comply.

We, therefore, command you, the said constable, forthwith to carry the said C. D. to the common jail of said county, and deliver him to the keeper thereof; and you, the said keeper, are hereby required to receive the said C. D. into your custody, in the said jail, and him there safely keep for the want of sureties until he shall be discharged by due course of law. Witness, the said *Seth B. Farwell*, Esquire, at in the county of *La Salle*, the day of 18

Seth B. Farwell.

Endorsement.

"Bail ought to be taken in the sum of $250.00.

"*Seth B. Farwell*,
"Justice of the peace."

Form of mittimus by two justices.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county, and to the keeper of the common jail of said county:

Whereas, C. D. has been arrested and brought before *Seth B. Farwell*, Esquire, one of the justices of the peace of the

said county, charged, on the oath of A. B., with [having, on the day of 18 feloniously and falsely made, forged, and counterfeited a certain promissory note, purporting to be the promissory note of A. B. to the said C. D., for the payment of fifty dollars;] and the said justice having associated with him *Jabez Fitch*, Esquire, a neighboring justice of the peace of the said county, and they having taken the examination of the witnesses and considered the proofs adduced and the law arising thereon, did adjudge that the said offence had been committed, and that there was probable cause to believe the said C. D. to be guilty of the charge exhibited against him, and required him to enter into a recognizance, with good and sufficient sureties, in the sum of dollars, for his personal appearance at the next term of the circuit court to be held in and for the county of *La Salle*, on the first day thereof, with which requisition the said C. D. has failed to comply.

We, therefore, command you, the said constable, forthwith, to convey the said C. D. to the common jail of the said county, and deliver him to the keeper thereof; and you, the said keeper, are hereby required to receive the said C. D. into your custody in the said jail, and him there safely keep for the want of sureties, until he shall be discharged by due course of law. Witness, the said *Seth B. Farwell* and *Jabez Fitch*, Esquires, at *Ottawa*, in the county of *La Salle*, the day of 18

Seth B. Farwell,
Jabez Fitch.

Endorsement.

"Bail ought to be taken in the sum of $

"*Seth B. Farwell*,
"*Jabez Fitch*,
"Justices of the peace."

Form of mittimus where prisoner confessed the offence.

State of Illinois, }
La Salle County, } ss. The people of the state of Illinois to any constable of the said county, and to the keeper of the common jail of said county:

These are to command you, the said constable, forthwith to convey and deliver into the custody of the keeper of the common jail of the said county, the body of C. D., this day brought before *Seth B. Farwell*, Esquire, one of the justices of the peace in and for the said county, and charged, upon the oath of A. B., with [having, on the day of 18 at in the county aforesaid, feloniously stolen, taken, and carried away one gold watch, of the value of fifty dollars, the property of the said A. B.,] which the said C. D.

has confessed upon his examination before the said justice of the peace, and having been required, by the said justice, to enter into a recognizance, with sufficient sureties, for his appearance the first day of the next term of the circuit court, to be held in and for the county of *La Salle*, with which requisition the said C. D. has failed to comply; and you, the said keeper, are hereby required to receive the said C. D. into your custody in the said jail, and him there safely keep, for the want of sureties, until he shall be discharged by due course of law. Witness, the said justice, at *Ottawa*, in the county of *La Salle*, the day of . 18 *Seth B. Farwell.*

Endorsement.

"Bail ought to be taken in the sum of $

"*Seth B. Farwell,*
"Justice of the peace."

Mittimus by a justice for an offence in his presence.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county, and to the keeper of the common jail of said county:

These are to command you, the said constable, forthwith to convey and deliver into the custody of the keeper of the common jail of the said county, the body of C. D., charged by *Seth B. Farwell*, Esquire, one of the justices of the peace of the said county, upon the view of the said justice, with having, on this present day, at *Ottawa*, in the said county, with an abandoned heart, and without provocation, feloniously, with a deadly weapon, to wit, a hatchet, made an assault upon A. B., with intent to inflict upon the person of the said A. B. a bodily injury, he, the said C. D., having been required to enter into a recognizance, with sufficient sureties, to be and appear at the next term of the circuit court to be held in and for the said county of *La Salle*, on the first day thereof, and having neglected to comply with such requisition; and you, the said keeper, are hereby required to receive the said C. D. into your custody in the said jail, and him there safely keep for want of sureties, and until he shall be discharged by due course of law. Witness, the said *Seth B. Farwell*, Esquire, at *Ottawa*, in the county aforesaid, the day of 18 *Seth B. Farwell.*

Endorsement.

"Bail ought to be taken in the sum of $

"*Seth B. Farwell,*
"Justice of the peace."

FORMS OF RECOGNIZANCES TO GIVE EVIDENCE.

Form of recognizance of a witness.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 A. B., of in the county aforesaid, comes before *Seth B. Farwell*, Esquire, a justice of the peace of the said county, and acknowledges himself to owe the people of the state of Illinois the sum of dollars, to be made and levied of his goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the condition following:

The condition of this recognizance is such, that, if the bounden A. B. shall personally be and appear at the next term of the circuit court, to be held in and for the said county of *La Salle*, on the first day thereof, to give evidence on behalf of the said people against C. D., for [feloniously stealing, taking, and carrying away a silver watch, the property of A. B.,] as well to the grand jury as to the petit jury, and do not depart the court without leave, then this recognizance to be void, or else to remain in full force. A. B.

Taken, subscribed, and acknowledged the day and year first above written, before *Seth B. Farwell.*

Form of recognizance by several witnesses.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 A. B., E. F., and G. H., all of in the county aforesaid, come before *Seth B. Farwell*, Esquire, a justice of the peace of the said county, and each of them separately acknowledges himself separately and individually to owe to the people of the state of Illinois the sum of dollars, to be made and levied of his goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the condition following:

The condition of this recognizance is such, that, if the said A. B., E. F., and G. H. shall severally appear at the next term of the circuit court, to be held in and for the said county of *La Salle*, to give evidence in behalf of the said people against C. D., for (*here state the offence briefly*) as well to the grand jury as to the petit jury, and do not depart the court without leave, then this recognizance to be void, otherwise to remain in full force.

A. B.
E. F.
G. H.

Taken, subscribed, and acknowledged the day and year first above written, before *Seth B. Farwell.*

For a recognizance of witness with sureties.

State of Illinois, }
La Salle County, } ss. Be it remembered, that, on the day of 18 A. B., of in the county aforesaid, and E. F. and G. H., of the same place, personally come before *Seth B. Farwell*, Esquire, one of the said justices of the peace of the said county, and severally and respectively acknowledge themselves to owe to the people of the state of Illinois, that is to say, the said A. B. the sum of dollars, and the said E. F. and G. H. each the sum of dollars, to be levied of their goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the condition following:

The condition of this recognizance is such, that, if the said A. B. shall personally appear on the first day of the next term of the circuit court, (*as the former precedents.*)

Form of recognizance by sureties by an infant or married woman.

State of Illinois, }
La Salle county, } ss. Be it remembered, that on the day of 18 E. F. and G. H., of the county aforesaid, personally come before *Seth B. Farwell*, Esquire, one of the justices of the peace of the said county, and severally and respectively acknowledge themselves to owe to the people of the state of Illinois each the sum of dollars, to be levied of their respective goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the condition following:

The condition of this recognizance is such, that, if I. J., who is an infant, (or "a married woman,") shall personally appear, on the first day of the next circuit court, (*as in the former precedents.*)

COMMITMENT OF WITNESSES.

Commitment of a witness for refusing to enter into a recognizance.

State of Illinois, }
La Salle County, } ss. The people of the state of Illinois, to any constable of the said county, and to the keeper of the common jail of the said county:

We command you, the said constable, forthwith to convey and deliver into the custody of the said keeper the body of G. H., it appearing by the examination of the said G. H., taken on oath before *Seth B. Farwell*, Esquire, one of the justices of the peace of the said county, that he is a material witness against C. D., on a charge made on oath against the said C. D., for (*here set forth the offence briefly*,) it having been adjudged by the said justice that the said offence has been been committed, and that there is probable cause to believe the said C. D. to be guilty thereof; and the said G. H., being required to enter into a recognizance, in the sum of dollars, for his personal appearance at the next term of the circuit court, to be held in and for the county of *La Salle*, on the first day thereof, to give evidence on behalf of the people against the said C. D. for the offence aforesaid, with which requisition the said G. H. has refused to comply; and you, the said keeper of the said jail, are hereby required to receive the said G. H. into your custody, in the said jail, and him there safely keep until he shall enter into such recognizance, or be otherwise discharged according to law. Witness, the said justice, at *Ottawa*, in the county of *La Salle*, the day of 18 *Seth B. Farwell.*

Form of commitment of witness for the want of sureties.

State of Illinois, }
La Salle County, } ss. The people of the state of Illinois to any constable of said county, and to the keeper of the common jail of the said county:

We command you, the said constable, forthwith to convey and deliver into the custody of the keeper of the common jail of the said county the body of G. H., it appearing, by the examination of the said G. H. taken on oath before *Seth B. Farwell*, Esquire, one of the justices of the peace of the said county, that he is a material witness against C. D., on a charge made on oath against him for (*set forth the offence briefly*,) it having been adjudged by the said justice that the said offence has been committed, and that there is probable cause to believe the said C. D. to be guilty thereof, and the said justice being satisfied, by due proof, (or "by the admissions of the said G. H.,") that there is good reason to believe that the said G. H. would not fulfil the condition of a recognizance unless sureties be required, and the said G. H. being required by the said justice to enter into a recognizance, with one good and sufficient surety, in the sum of dollars, for his personal appearance at the next term of the circuit court to be held in and for the said county of *La Salle*, on the first day thereof, to give evidence on behalf of the said people against the said C. D. for the offence aforesaid, with which

requisition the said G. H. has failed to comply; and you, the said keeper, are hereby required to receive the said G. H. into your custody in the said jail, and him there safely keep until he shall enter into such recognizance with such surety, as aforesaid, or be otherwise discharged by due course of law. Witness, the said *Seth B. Farwell*, Esquire, at *Ottawa*, in the county of *La Salle*, the day of 18

Seth B. Farwell.

Form of commitment of an accomplice to give evidence.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county, and to the keeper of the common jail of said county:

We command you, the said constable, forthwith to convey and deliver into the custody of the said keeper the body of G. H., charged before *Seth B. Farwell*, Esquire, one of the justices of the peace of the said county, on his own confession, in being an accomplice with C. D. in [feloniously stealing, taking, and driving away one yoke of oxen, of the value of forty dollars, the property of A. B.,] he, the said G. H., being by the said justice admitted as a witness on the part and behalf of the people against the said C. D., and, on being required so to do, has not offered security for his appearance at the next term of the circuit court to be held in and for the said county of *La Salle*, on the first day thereof; and you, the said keeper, are hereby required to receive the said G. H. into your custody, in the said jail, and him there safely keep, for the want of sureties, until he shall be discharged by due course of law. Witness, *Seth B. Farwell*, Esquire, at *Ottawa*, in the county of *La Salle*, the day of 18

Seth B. Farwell.

RECOGNIZANCE AFTER COMMITMENT.

Form of recognizance of a prisoner after commitment.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 C. D., of in the county aforesaid, and E. F. and G. H., of the same place, personally come before *Seth B. Farwell* and *Jabez Fitch*, Esquires, two of the justices of the peace of said county, and severally and

respectively acknowledge themselves to owe to the people of the state of Illinois, that is to say, the said C. D. the sum of dollars, and the said E. F. and G. H. each the sum of dollars, separately to be made and levied of their respective goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the condition following:

The condition of this recognizance is such, that, if the said C. D., who has been committed to the common jail of the said county for the want of sureties, shall personally be and appear at the next term of the circuit court to be held in and for the said county of *La Salle*, on the first day thereof, to answer to an indictment to be preferred against him for (*here state the offence briefly,*) and to do and receive what shall, by the court, be then and there enjoined upon him, and shall not depart the court without leave, then this recognizance to be void, or else to remain in full force. C. D.

Taken, subscribed, and acknowledged the day and year first above written, before *Seth B. Farwell*, *Jabez Fitch*. E. F. G. H.

Form of recognizance of witness after commitment.

State of Illinois, }
La Salle County, } ss. Be it remembered, that, on the day of 18 E. F., of in the county aforesaid, comes before *Seth B. Farwell* and *Jabez Fitch*, Esquires, two of the justices of the peace of the said county, and acknowledges himself to owe to the people of the state of Illinois the sum of dollars, to be made and levied of his goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the condition following:

Whereas, on the day of 18 C. D. was brought before *Seth B. Farwell*, Esquire, one of the justices of the peace of the said county, and charged, on the oath of A. B., with [having feloniously stolen, taken, and led away one sorrel horse, of the value of sixty dollars, the property of the said A. B.,] and, upon the examination of the said C. D. before the said justice, on that day, the said E. F. was produced and sworn, whose evidence the said justice deemed material to prove the offence so charged, and required him to enter into a recognizance to appear at the next term of the circuit court to be held in and for the said county, on the first day thereof, and not depart without leave, which he refused to do, and was thereupon committed to the common jail of the said county:

Now, therefore, the condition of this recognizance is such, that, if the above bounden E. F. shall personally be and ap-

pear at the next term of the circuit court, to be held in and for the said county of *La Salle*, on the first day thereof, to give evidence on behalf of the people against the said C. D., touching the said offence so charged, as well to the grand jury as to the petit jury, and do not depart the court without leave, then this recognizance to be void, or else to remain in full force. E. F.

Taken, subscribed, and acknowledged the day and year first above written, before *Seth B. Farwell*, *Jabez Fitch*.

LIBERATE.

Liberate, or warrant to discharge a prisoner upon his finding sureties after commitment.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to the keeper of the common jail of the said county:

These are to require you to discharge from imprisonment C. D., now in your custody on the warrant of commitment under the hand of *Seth B. Farwell*, Esquire, one of the justices of the peace of the said county, dated the day of 18 for [having feloniously stolen, taken, and carried away one gold watch, the property of A. B.,] if detained for no other cause, he having entered into a recognizance before *Seth B. Farwell* and *Jabez Fitch*, Esquires, two of the justices of the peace of the said county. Witness, the said *Seth B. Farwell* and *Jabez Fitch*, Esquires, at *Ottawa*, in the said county, the day of 18

Seth B. Farwell, [L. S.]
Jabez Fitch. [L. S.]

Another Form.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to the keeper of the common jail of the said county:

Discharge from imprisonment C. D., if detained in your custody for no other cause than what is mentioned in the warrant for his commitment under the hand of *Seth B. Farwell*, Esq., (or "hands of *Seth B. Farwell* and *Jabez Fitch*, Esquires, two of the justices") of the peace of the said county, dated the

day of 18 Witness, the said *Seth B. Farwell* and *Jabez Fitch*, Esquires, two of the justices of the peace of the said county, the day of 18

Seth B. Farwell, [L. S.]
Jabez Fitch. [L. S.]

CHAPTER IX.

OF PROCEEDINGS FOR THE PRESERVATION AND OBSERVANCE OF THE PEACE.

The civil division of the territory of England was, originally, into two counties, of those counties into hundreds, of those hundreds into tithings or towns. These tithings were instituted to prevent the rapines and disorders which formerly prevailed in the realm, and were so called from the Saxon, because ten freeholders, with their families, composed one.

These all dwelt together, and were sureties or free-pledges to the king for the good behavior of each other; and, if any offence was committed in their districts, they were bound to have the offender forthcoming. 1 *Bl. Com.*, 114.

But this great and general security being now fallen into disuse and neglect, there hath succeeded to it the method of making suspected persons find particular and special sureties for their future conduct. 4 *Bl. Com.*, 252. By the commission of the peace, one or more justices have power to cause to come before them all those who, to any of the king's people, concerning their bodies or the firing of their houses, have used threats, to find sufficient security for the peace or their good behavior towards the king and his people; and, if they shall refuse to find such security, to cause them, in person, to be safely kept until they shall find such security. 4 *Burn's Justice*, 265.

In this state, the powers and duties of justices of the peace, in requiring and taking surety for the peace and for good behavior, has been regulated by statute. *Ante* 21.

Surety for the peace is the acknowledging a recognizance to the people of the state, taken by a competent judge of record, for the keeping the peace. And this surety of the peace every justice of the peace may take and command by a twofold authority:

1. As minister, commanded thereto by a higher authority, as, when a writ of *supplicavit*, directed out of the Chancery or King's Bench, (circuit court in this state,) is delivered to him.

2. As a judge, and by virtue of his office. 4 *Burn's Justice*, 265.

Sureties for the peace and for the good behavior are, in some respects, different, especially as to the cause of granting and the means of forfeiting them, and will be considered separately.

1. *Surety for the peace.*

1. For what cause surety of the peace shall be granted.
2. At whose request and against whom it shall be granted.
3. In what manner it shall be granted.
4. How the warrant may be superseded.
5. How the warrant shall be executed.
6. Of the recognizance.
7. How the recognizance may be forfeited and proceeded on.
8. How the recognizance may be discharged.
9. Of the recognizance of witnesses.

1. *For what cause surety of the peace shall be granted.*

Any justice of the peace may, according to his discretion, bind all those to the peace who, in his presence, shall make any affray, or shall threaten to kill or beat any person, or shall contend together with hot words, or shall go about with unusual weapons or attendance, to the terror of the people; and, also, all such persons as shall be known by him to be common barrators; and, also, all who shall be brought before him by a constable for a breach of the peace in the presence of such constable; and all such person who, having been before bound to keep the peace, shall be convicted of having forfeited their recognizance. 4 *Bl. Com.*, 255.

Whenever a person has a just cause to fear that another will burn his house, or do him a corporeal hurt, as by killing, imprisoning, or beating him, or that he will procure others to do him such mischief, he may demand the surety of the peace against such person, and that every justice of the peace is bound to grant it, upon the party giving him satisfaction, upon oath, that he is actually under such fear, and that he has just cause to be so, by reason of the other's having threatened to beat him or lain in wait for that purpose, and that he does not require it out of malice or for vexation. 1 *Hawk.*, 127.

He that standeth bound to keep the peace, if his sureties be insufficient, the same justice, or another justice of the peace, may compel him to find better sureties. *Dalt. Justice*, 381.

If the justice shall perceive that surety is demanded merely for malice or vexation only, without any just cause or fear, it seemeth he may safely deny it; as in common experiance we find it that, when a person shall, upon just cause, come and crave the peace against another and hath it granted to him, when such other person shall come before the justice, he likewise shall crave the peace against the former, and will, perhaps, surmise some cause; but yet, nevertheless, be content to surcease his suit and demand, so as the other will relinquish to have the peace against him. Here the justice will do well not to be too forward in granting the peace thus required by the latter, but to persuade him, and to show him the danger of his oath which he is to take; but yet, if he will not be persuaded, but will take his oath that he is in fear, where indeed he neither doth fear nor hath cause to fear, this oath shall discharge the justice, and the fault shall remain on such complainant. *Dalt. Justice*, 382.

And, if a man will require the peace because he is at variance or in suit with his neighbor, it shall not be granted. *Dalt. Justice*, 382.

Mr. Dalton says, if one person threatens to hurt the wife or child of another, who craves the peace at the justice's hands, he sees no cause why it ought not to be granted. *Dalt. Justice*, 382. But security of the peace ought not to be granted because one person threatens to hurt the servant of another; and the reason seems to be, because it should be the servant's fear, in such case, and not the master's, and the servant's own oath before the justice is necessary. 4 *Burn's Justice*, 268.

The surety of the peace should not be granted but where there is a fear of some present or future danger, and not merely for a battery or trespass that is past, or for any breach of the peace that is past, for this surety of the peace is only for the security of such as are in fear; but the party wronged may bring his action, or punish the offender by indictment, and the justice, if he see cause, may bind over the offender to answer unto the indictment. 4 *Burn's Justice*, 268.

And, if one person should threaten to beat another or otherwise injure his person, and, at the same time, says, "but your age protects you," it would seem that the justice should not grant the peace.

Surety of the peace should be craved soon after the cause of the fear on account of which it is craved, for the suffering of much time to pass before it is craved, shows that the party craving it has not been under great fear. 6 *Mod.*, 132.

2. *At whose request and against whom it shall be granted.*

All persons whatsoever, being of sane memory, whether citizens or aliens, or attainted of treason, &c., have a right to

demand surety of the peace; and a wife may demand it against her husband threatening to beat her outrageously, or to kill her. 6 *Bac. Ab.*, 429.

If her husband, by ill usage or threats, place her life or person in danger, she may obtain sureties to keep the peace; 1 *Jac. & Walk.*, 438; and she may even subject her husband to the payment of an attorney's bill in enforcing such sureties against him, the same being considered necessary. 3 *Camp.*, 326. 1 *P. Wms.*, 482. And a husband may, also, demand surety for the peace against his wife, if necessary. 4 *Bl. Com.*, 454.

Surety of the peace may be granted against any person whatsoever being of sane memory, whether he be a magistrate or private person, and whether he be of full age or under age. But infants and feme coverts ought to find surety by their friends, and not be bound themselves. 1 *Hawk.*, 127.

3. *In what manner it shall be granted.*

The justice may command this surety of the peace either by word only or by writing.

1. *By word only.* Justices of the peace have full power to enforce, or cause to be enforced, all laws that now exist or shall hereafter be made for the preservation and observance of the peace. *Gale's Stat.*, 237.

If one man doth threaten another, in the presence and hearing of a justice, or shall make an affray or assault upon another, or do the like thing tending to the breach of the peace, the justice may command him by word to find sureties of the peace. *Dalt. Justice.* 5, 387. *Breese's Rep.*, 165.

In many cases, the justice of the peace ought, of duty, or, at least, in good discretion, to command the surety for the peace, although the same be not required by any other person. *Dalt. Justice*, 381.

If any person shall demand this surety against another who is then in the presence of the justice, and will be sworn that he is afraid of the party, the justice may by word command the same party to find surety of the peace. *Dalt. Justice*, 387.

And justices, in such case, may by word only command the constable or any other known officer, or any private person then being present, to arrest such party to find sureties of the peace, and to take the party into his or their custody, &c.; and, if the party shall refuse to find such sureties, then the justice of the peace may commit him to jail. *Dalt. Justice*, 387. 1 *Hawk.* 128.

2. *By writing.* Justices of the peace have power to cause to come before them, or any of them, all persons who shall threaten to break the peace, or shall use threats against any person within this state concerning his or her body, or threaten

to injure his or her property, or the property of any person whatever, and, also, all such persons as are not of good fame; and the said justice, being satisfied by the oath of one or more witnesses of his or her bad character, or that he or she had used threats as aforesaid, shall cause such person or persons to give good security for the peace, or for their good behavior, towards all the people of this state, and particularly towards the individual threatened. *Gale's Stat.*, 239.

If the party against whom this surety of the peace is demanded be absent, a justice of the peace cannot send for or command him to be arrested and brought before him, or to be imprisoned, by word only, but he must make his warrant or precept in writing. *Dalt. Justice*, 387. 6 *Bac. Ab.*, 436.

The justice may make the warrant *general*, to bring the party before himself or some other justice, or he may make it *special*, to bring the party before himself only; for he that maketh the warrant, for the most part, hath the best knowledge of the matter, and, therefore, he is the fittest to do justice in the case. 4 *Burn's Justice*, 269. 6 *Bac. Ab.*, 436.

A conservator of the peace, being required to see the peace kept, if he shall be negligent therein, he may be indicted and fined for the same. *Dalt. Justice*, 5.

The warrant should be directed to some officer, or other indifferent person, and must contain the cause and at whose suit, to the intent the party to be bound may provide his sureties and take them with him. *Dalt. Justice*, 387.

And, 3. *By supplicavit.* This is a writ issuing out of Chancery or the King's Bench (circuit court in this state) for the taking surety of the peace when one is in danger of being hurt in his body by another, and it is directed to the justices of the peace and the sheriff of the county, and, when obtained, the person against whom it is sued may come into court and there find sureties that he will not do hurt or damage unto him that sueth the writ, and, upon that, he shall have a writ of *supersedeas*, directed to the justices, &c., reciting his having found sureties according to the writ of *supplicavit*, and, also, that writ, and the manner of security that he hath found, &c., commanding the justices that they cease to arrest him, or to compel him to find sureties, &c. Sometimes this writ is made returnable at a certain day, and directed to the justices of the peace, or to one of them, or to the sheriff, or every of them, to cause the party that is to be bound to come before him or them to find sureties of the peace. And the writ may direct that the principal and sureties shall be bound in certain sums, or may refer the sums to the discretion of the justice. The writ further directs that, if the party shall refuse, &c., they shall commit him to jail, and that, when they have taken surety, they do certify the recognizance which they have taken under their seals, and return the writ into the court

from which it was awarded. *Jac. Law Dic.* (*Supplicavit.*) *Dalt. Justice*, 404. *Chit. Gen. Pr.*, 682.

4. *How the warrant may be superseded.*

It is said that, if one who fears the surety of the peace will be demanded against him find sureties before any justice of the same county, either before or after a warrant is issued against him, he may have a *supersedeas* from such justice, which shall discharge him from arrest from any other justice at the suit of the same party for whose security he has given such surety. 4 *Burn's Justice*, 270. 6 *Bac. Ab.*, 411.

In the *supersedeas*, it is not necessary to name either the sureties or the sum in which they are bound, but yet it is the better form to express them both. 4 *Burn's Justice*, 270.

And it is said that a party may, either before or after that he is bound before a justice, give surety for the peace in the Chancery or the King's Bench, (circuit court in this state,) and that, thereupon, the party may have a *supersedeas* out of the court where he hath given such surety to restrain the justices of the peace of the county from taking any surety of the peace of him; and then the justices of the peace of the county, after the receipt of such *supersedeas*, must forbear to make any warrant for the peace against the party.

And, if any justice of the peace has granted out any such warrant against the said party, the said justice must make his *supersedeas* to the officers, thereby commanding them to surcease to put his former warrant in execution, and so to discharge it, and the party of an arrest or imprisonment thereupon. *Dalt. Justice*, 390. 6 *Bac. Ab.*, 412.

If such *supersedeas* shall be directed to the justice of the peace and sheriff, the justice to whose hands it shall be delivered may keep it, and deliver the label to the party. *Dalt. Justice*, 390.

In these and the like cases, the justice of the peace shall do well to send to the next circuit court as well the said *supersedeas* as, also, the recognizance which he had formerly taken, (if he have taken any,) for the recognizance might be forfeited before the *supersedeas* was issued. *Dalt. Justice*, 390.

If any officer, having a warrant from a justice of the peace to arrest a man to find surety of the peace, shall receive a *supersedeas* out of the circuit court, or from any justice of the supreme court, judge of a circuit court, or justice of the peace of the county, to discharge the same surety of the peace, and yet will urge the party, by force of his warrant, to find new surety for the peace, the party may refuse to give it; and, if he be arrested or imprisoned for such refusal, he may have his action of false imprisonment against such officer, for such

supersedeas is a discharge of the former precept or warrant. *Dalt. Justice*, 390.

5. *How the warrant shall be executed.*

It can be executed only by the persons to whom it is directed, or some of them, unless it be directed to the sheriff, who may, either by parol or by precept in writing, authorize an officer, sworn and known, to serve it, but cannot empower any other person without a precept in writing. 1 *Hawk.*, 128.

It seems generally agreed that, where a person, authorized by warrant of a justice of the peace to compel a man who is sheltered in a house to find sureties for the peace or good behavior, is denied quietly to enter it, he may justify breaking open the door in order to take him; but he must first signify to those in the house the cause of his coming and request them to give him admittance. 2 *Hawk.*, 86.

If the warrant *specially* direct that the party shall be brought before the justice who made it, the officer ought not to carry him before another. But, if the warrant be *general*, to bring him before any justice of such place, the officer has the election to bring him before what justice he pleaseth. 6 *Bac. Ab.*, 436.

It would seem, however, as a general rule, the officer ought to take the party before the justice who issued the warrant, unless there be some reasonable cause for his not doing so.

And, if the party is carried before another justice, and not before him who issued the warrant, such other justice must take the surety and bind him, by recognizance, in all points as the form of the precept doth require; and, therefore, such other justice, having so taken surety of the peace, may and ought, upon request, to make his *supersedeas* to all officers and to all other justices of the same county, and thereby the said party shall be discharged from finding other surety and from any other arrest for the same cause.

But, by such *supersedeas*, the other justice cannot discharge the warrant of the first justice until the party be bound in deed, nor give any other day to the party to appear. *Dalt. Justice*, 389.

If the warrant be in the common form, requiring the officer to cause the party complained of to come before the justice to find sufficient surety, and, if he shall refuse so to do, to convey him immediately to prison, without expecting any further warrant until he shall willingly do the same, the officer who serves it, before he makes any arrest, ought first to require the party to go with him and find surety, according to the purport of the warrant; but, upon refusal to do either, that is, either to go before the justice or to find sureties, he may carry

him to jail by force of the same warrant, without more. 1 *Hawk.*, 128. *Dalt. Justice*, 388.

And yet the constable or officer may bring him, in that case, before the justice, and, if he refuses there to give sureties, he may commit him without any further warrant or mittimus. 2 *Hale*, 112.

Nevertheless, Mr. Burn observes, notwithstanding these great authorities, it may not be convenient for the justice to leave so much to the constable's judgment as to determine what shall or shall not be deemed a refusal to find such sureties, for that the constable is constituted a judge on such case by no law. And much less does it seem advisable to require in the warrant, as is usual, that the constable shall carry the party to jail if he shall refuse to find sufficient sureties, for it doth not appear how the constable can any way be deemed as a proper judge of that, for it is certain that he cannot administer an oath to such sureties, or others, whereby to inform himself of such sufficiency. 4 *Burn's Justice*, 272.

If the officer do arrest the party and do not carry him before the justice to find sureties, or, upon the refusal of the party, if the officer shall arrest him and do not carry him to jail, in both these cases the officer is punishable for this neglect by indictment and fine, and the party arrested may have his action of false imprisonment for the arrest; for, where the officer doth not pursue the effect of his warrant, his warrant will not excuse him of that which he hath done. 4 *Burn's Justice*, 272.

In this state, it seems that the officer having the warrant to execute is not authorized to require the party to find sureties, and to keep him until he can find sureties to come to him, for the statute makes it necessary that the warrant should require the officer to cause the party to come before the justice by whom it is issued.

When the party comes before the justice, he must offer sureties, or else the justice may commit him, for the justice need not demand surety of him. *Dalt. Justice*, 388.

But it is said to have been laid down, that no person ought to be committed by a justice of the peace for not finding surety for the keeping the peace until he has been required to find security and has refused or neglected to do it. 6 *Bac. Ab.*, 436.

"If any person against whom such proceedings are had shall fail to give a recognizance with sufficient sureties, it shall be the duty of the judge or justice of the peace before whom he or she shall be brought to commit such person or persons to the jail of the proper county until such sureties be given, or until the next term of the circuit court." *Gale's Stat.*, 237.

There is no provision in the statute requiring the justice, when any person is brought before him on a warrant for the

surety of the peace, to examine the complainant and witnesses in the presence of such person, as is required on the return of a warrant for an offence actually committed; but it seems that such person must give surety to the justice without any further examination, upon being required so to do, according to the rules and practices of the common law.

If the justice, having taken surety, was deceived in the sufficiency, he or any other justice may afterwards compel the party to find and put in other sufficient sureties, and may take a new recognizance. But, if the sureties die, the principal shall not be compelled to find new sureties, because their executors and administrators are liable. Also, if a person that was bound to keep the peace hath broken his recognizance, the justice ought, of discretion, to bind him anew, but not until he be thereof convicted by due course of law; for, before conviction, he standeth indifferent whether he hath forfeited his recognizance or not. *Dalt. Justice*, 381. 4 *Burn's Justice*, 272.

6. *Of the recognizance.*

It is said by Mr. Dalton, that this recognizance which the justice takes is rather of congruance than by any express authority given them. *Dalt. Justice*, 392.

And it has been said that a recognizance to keep the peace for a year, or for life, or without expressing any certain time, or without fixing any time or place for the party's appearance, or without binding him to keep the peace against all the king's people, is good. But that it seems the safest to bind the party to appear at the next sessions of the peace, and, in the mean time, to keep the peace as to the king and all his liege people, especially as to the party, according to the common form of precedents. 1 *Hawk.*, 129.

In this state, the judge or justice of the peace before whom any person or persons may be brought upon a warrant for the peace or good behavior, being satisfied by the oath of one or more witnesses of his or her bad character, or that he or she had used threats as aforesaid, shall cause such person or persons to give good security for the peace, or for their good behavior towards all the people of this state, and, particularly, towards the individual threatened. *Gale's Stat.*, 237.

Where a recognizance is taken before a justice of the peace upon a complaint before him, it seems that it rests wholly in the discretion of such justice to appoint and allow the number of sureties, their sufficiency in goods or lands, and the sum of money wherein they shall be bound. 1 *Hawk.*, 129.

But, if the recognizance is taken in pursuance of a writ of *supplicavit*, it must be wholly governed by the direction of said writ. 1 *Hawk.*, 129.

All recognizances for the peace or good behavior shall be returnable at the next term of the circuit court to be held in the proper county. *Gale's Stat.*, 237.

They shall be signed by the parties and certified by the judge, or justice of the peace, or other officer taking the same, and delivered to the clerk of the circuit court on or before the day mentioned therein for the appearance of the party therein bound. *Gale's Stat.*, 239.

And all such recognizances shall be renewned or dismissed as the said circuit court shall, upon examination of the witnesses, deem just and right. *Gale's Stat.*, 238.

The recognizance is forfeited if the party make default of appearance, and the same default shall be recorded. 4 *Burn's Justice*, 274.

However, if the party have any excuse for his not appearing, it seems that the court is not bound peremtorily to record his default, but may equitably consider the reasonableness of such excuse. 1 *Hawk.*, 130.

The recognizance may be forfeited by any actual violence to the person of another, whether it be done by the party himself or by others through his procurement, as manslaughter, rape, robbery, unlawful imprisonment, and the like; and so it may be by any unlawful assembly, in terror of the people. 1 *Hawk.*, 130.

And it may even be forfeited by words directly tending to a breach of the peac; as, by challenging a person to fight, or, in his presence, threatening to beat him. *Dalt. Justice*, 399. 1 *Hawk.*, 130. Otherwise, if the party be absent. And yet, if the party so bound shall threaten to kill or beat a person who is absent, and, after, shall be in wait for him to kill or beat him, this is a forfeiture of the recognizance. *Dalt. Justice*, 399. 6 *Bac. Ab.*, 438.

7. *How the recognizance may be forfeited and proceeded on.*

There are divers things which may be done against the peace, and divers offences for which an indictment against the peace will lie; and yet the committing and doing such offences or acts shall be no forfeiture of the recognizance for the peace, for that the act that shall cause a forfeiture of such recognizance must be done or intended unto the person, in terror of the people. Therefore, to enter into lands where he ought to bring his action, or to disseise another of his lands, or to enter into lands or tenements with force, being without offer of violence to any man's person and without public terror, or to do a trespass in another man's corn or grass, or to take away another man's goods wrongfully, so it be not from his person, or to steal another man's horse or other goods feloniously, being not from his person: all these and the like are

breaches of the peace, and yet these will make no breach of this recognizance. 4 *Burn's Justice*, 273.

A recognizance for keeping the peace is not forfeited when an officer, having a warrant to arrest a person who will not suffer himself to be arrested, beats or wounds him in an attempt to arrest him. So if a parent, in a reasonable manner, chastise his child, a master his servant, or a schoolmaster his scholar, neither of these is a forfeiture of a recognizance for keeping the peace. And, without enumerating all the assaults which one may make upon another without forfeiting a recognizance for keeping the peace, it may, in the general, be said that the recognizance is not forfeited by any assault which could have been justified in an action or upon an indictment for the assault. 1 *Hawk.*, 130.

And it seems that it shall not be forfeited by bare words of heat and choler, as the calling a man knave, liar, rascal, or drunkard; for, though such words may provoke a choleric man to break the peace, yet they do not directly challenge him to it; nor does it appear that the speaker designed to carry his resentment any farther. And it hath been said that even a recognizance for the good behaviour shall not thus be forfeited. 1 *Hawk.*, 130. 6 *Bac. Ab.*, 438.

The circuit court of the county into which any such recognizance shall be certified and returned by any justice of the peace, shall renew or dismiss the same as, upon examination of witnesses, the said court shall deem just and right. And, where the person or persons committed are in jail at the sitting of such court, the court shall examine the witnesses, and either continue the imprisonment, bail the prisoner, or discharge him or her as to the said court shall appear to be right, having due regard to the safety of the citizens of the state. *Gale's Stat.*, 238.

In general, it is advisable to have corroborative evidence. But no evidence in contradiction of the facts respecting the battery or injury and threats of repetition is to be received, as they are to be taken as true until negatived through the medium of an appropriate prosecution; but an explanation of ambiguous parts of the complainants' evidence may be received. And it should seem that proof showing direct evidence of express malice on the part of the complainant, such as a declaration to that effect, though not of inferred malice, collected from general reasoning or collateral circumstances, may be received. 1 *Chit. Gen. Pr.*, 682.

A justice of the peace can in no case proceed against a party for a forfeiture of his recognizance; but, when it shall have been forfeited, the circuit court into which it shall have been certified and returned shall proceed thereupon by *scire facias;* and so it ought to be, if it be presented by the grand jury that the party has forfeited his recognizance by a breach of the peace. 4 *Burn's Justice*, 275.

8. *How the recognizance may be discharged.*

He who is bound to the peace and to appear at a certain day, must appear at the day and record his appearance although he who craved the peace cometh not to desire that it may not be continued, otherwise the recognizance cannot be discharged. *Dalt. Justice*, 395.

If a man is bound to keep the peace towards the people and especially towards a certain person, though such person cometh not to desire the peace may be continued, yet the court, by their discretion, may bind him over till the next court, and that may be to keep the peace against that person only, if they shall think good; for it may be that the person who first craved the peace is sick, or otherwise hindered so that he cannot come to that court to demand the continuance of the peace further. 4 *Burn's Justice*, 276. *Dalt. Justice*, 396.

It has been held that a recognizance may be discharged by the release of the party at whose complaint it was taken, being certified together with it; but this may justly be questioned, because the recognizance is not to the citizen but to the people, and, consequently, cannot be discharged by the citizen, who is not a party to it. However, such a release will be good inducement to the court to which such recognizance shall be certified to discharge it. 1 *Hawk.*, 129.

It is said by Mr. Dalton to have been held, that neither the justice of the peace nor the party can discharge the recognizance of the peace, by their release. For, first, the recognizance is made to the king, and therefore, none but the king can release or discharge the same. Secondly, the recognizance is taken for the appearance of the party, &c., as well as for his keeping the peace, and the release of the justice or of the party who demanded the surety cannot discharge the appearance of the party bound. And therefore, notwithstanding that the justice of the peace shall make or take any release of the peace, yet it shall be safe for the party bound to appear to save his recognizance, and, upon the certificate made by the justice of the peace to the sessions of such release, the conusor shall be then discharged, at least against the party who craved the peace. And, in truth, the appearance of the party bound seemeth requisite, notwithstanding any release made, *first*, to save his recognizance; and, *secondly*, that others may object against him in open sessions, if he hath broken the peace, so that he may be there indicted. *Dalt. Justice*, 398.

And it is said that the sureties are not discharged by their death; but that their executors or administrators do continue bound. 1 *Hawk.*, 129.

If the party be imprisoned for a default of sureties, and, after he that demandeth the peace against him happeneth to die, it

seemeth the justice may make his *liberate* or warrant for the delivery of such prisoner, for, after such death, there seemeth no cause to continue the other in prison.

Also, any justice of the peace may, upon the offer of such prisoner, take surety of him for the peace, and may thereupon deliver him. *Dalt. Justice*, 389.

9. *Of the recognizance of witnesses.*

When any person shall be recognized by any judge or justice for keeping the peace, or for good behavior, or committed to jail for neglecting or refusing to give a recognizance with sufficient sureties, such judge or justice of the peace shall also take recognizance for the appearance of all witnesses at the next term of the circuit court in the proper county. *Gale's Stat.*, 237.

2. SURETY FOR THE GOOD BEHAVIOR.

A man may be compelled to find sureties both for the good behavior and for the peace; and yet the good behavior includeth the peace, and he that is bound to the good behavior is therein also bound to the peace. 4 *Burn's Justice*, 277.

This surety for the good behavior being of near affinity to surety for the peace, both as to the manner in which it is taken, superseded, and discharged, it seems not to require a particular consideration, except as to these two points:

1. For what misbehavior it is to be required;
2. For what it shall be forfeited.

1. *For what misbehavior it is to be required.*

By the act of January 6, 1827, any judge or justice of the peace is authorized "to cause to come before them or any of them, all persons who shall threaten to break the peace or shall use threats against any person within this state, concerning his or her body, or threaten to injure his or her property, or the property of any person whatever; and also *all such persons as are not of good fame*, and the said judge or justice of the peace being satisfied by the oath of one or more witnesses of his or her bad character, or that he or she had used threats as aforesaid, shall cause such person or persons to give good security for the peace, or for their good behavior towards all the people in the state, and particularly towards the individual threatened." *Gale's Stat.*, 237.

It doth not appear that the conservators of the peace at common law had any power as touching the good behavior further than as it had a relation to the peace, and not as it is contradistinguished from it. 4 *Burn's Justice*, 277.

It is upon the broad construction of the statute of 34 Ed. III., which authorizes justices of the peace "to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprize of their good behavior," that the sense of it has been extended not only to offences immediately relating to the peace, but to divers mischiefs not directly tending to a breach of the peace.

In the construction thereof, Mr. Hawkins says: There seem to have been some opinions, that the statutes speaking of those that be not of good fame, mean only such as are defamed and justly suspected that they intend to break the peace, and that it doth not any way extend to those who are guilty of other misbehaviors not relating to the peace. But this seems much too narrow a construction, since the above mentioned expression of persons of evil fame, in common understanding, as properly includes persons of scandalous behavior in other respects, as those who, by their quarrelsome behavior, give just suspicion of their readiness to break the peace; and, accordingly, it seems always to have been the better opinion that a man may be bound to his good behavior for many causes of scandal, which give him a bad fame as being contrary to good manners only, as for haunting bawdy houses with women of bad fame, or for keeping bad women in his own house, or for speaking words of contempt of an inferior magistrate, as a justice of the peace or mayor, though he be not then in the actual execution of his office, or of any inferior officer of justice, or a constable, and such like, being in the actual execution of his office.

However, it seems the better opinion that no one ought to be bound to the good behaviour for any rash, quarrelsome, or unmanly words, unless they either directly tend to a breach of the peace or to scandalize the government by abusing those who are intrusted by it with the administration of justice, or to deter an officer from doing his duty, and, therefore, it seems that he who barely calls another rogue, rascal, or teller of lies, or drunkard, ought not for such cause to be bound to the good behavior.

However, says he, I cannot find any precise rules for the direction of a magistrate in this respect, and, therefore, am inclined to think that he has a discretionary power to take such surety of all those whom he shall have just cause to suspect to be dangerous, quarrelsome, or scandalous; as of those who sleep in the day and go abroad in the night, and of such as keep suspicious company, and of such as are generally suspected to be robbers, and the like, and of eavesdroppers and common drunkards, and all other persons whose misbehavior may reasonably be intended to bring them within the meaning of the statute, as persons of evil fame who, being described by an expression of so great latitude, seem in a great measure to be left to the judgment of the magistrate. But, if he commit one for the want of sureties, he must show the cause with con-

venient certainty. 1 *Hawk.*, 132. 4 *Bl. Com.*, 256. 6 *Bac. Ab.*, 441.

Our statute seems to have conferred upon justices of the peace the power of requiring surety for the good behavior from all such persons as are not of good fame, as distinguished from the common law power of conservators of the peace for requiring surety of the peace.

It appears that the justice of the peace is to cause such person or persons as are not of good fame, on being satisfied by the oath of one or more witnesses of his or her bad character, to give good security of their good behavior towards all the people of this state, and particularly towards the individual threatened. *Gale's Stat.*, 237.

Yet there are many cases which have been held to be within the meaning of the words, *not of good fame*, where there has been no threat against an individual or his property, or acts directly tending to a breach of the peace. In these cases it was probably intended by the statute that the justice should recognize such persons for their good behavior towards the people of the state generally.

It is said by Mr. Dalton, that the surety of the good behavior is to be granted at the suit of divers, and those being men of credit, and to provide for the safety of many; whereas the surety of the peace is usually granted at the request of one, and for the preservation of the peace chiefly towards one; yet the surety of good behavior may be granted at the suit of some one person. *Dalt. Justice*, 409.

2. *For what it shall be forfeited.*

A recognizance for the good behavior may be forfeited by all the same means as one for the security of the peace may be, and also by some others. 4 *Bl. Com.*, 256.

He who is bound to the good behavior ought to demean himself well in his carriage and in his company, not doing anything which shall be a cause of breach of the peace, or to put the people in fear, dread, or trouble; and so shall be intended of all things which concern the peace, but not in misdoing of other things which touch not the peace. *Dalt. Justice*, 408. 4 *Burn's Justice*, 290.

It has been laid down as a general rule, that whatever will be a good cause to bind a man to his good behavior, will forfeit a recognizance for it; yet this has since been denied, and indeed does by no means seem to be maintainable, because the statute, in ordering persons of evil fame to be bound in this manner, seems, in many cases, chiefly to regard the prevention of that mischief which they may justly be suspected to be likely to do, and in that respect require them to secure the public from that danger which may be probably apprehended from their future behavior, whether any actual crime can be

proved upon them or not; and it would be extremely hard, in such cases, to make persons forfeit their recognizance who yet may justly be compellable to give one, as those who keep suspicious company, or those who spend much money idly, without having any visible means of getting it honestly, or those who lie under a general suspicion of being rogues, and the like. 1 *Hawk.*, 132.

However, it seems that such a recognizance shall not only be forfeited for such actual breach of the peace for which a recognizance for the peace may be forfeited; but, also, for going armed with great numbers to the terror of the people, or speaking words tending to sedition: and, also, for all such actual misbehaviors which are intended to be prevented by such a recognizance, but not barely giving cause of suspicion of what perhaps may never happen. 1 *Hawk.*, 133.

Form of warrant for the peace.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county:

Whereas, A. B. of *Ottawa*, in the said county, hath this day personally appeared before *Jabez Fitch*, Esquire, one of the justices of the peace in and for the said county, and made oath that he is afraid that C. D. will beat (wound, maim, or kill) him, for that the said C. D. hath lately assaulted him with a large knife and threatened to plunge it through his heart, and to kill him at any rate, and hath demanded security for the peace against the said C. D., and the said justice of the peace being satisfied by the oath of the said A. B. that the said C. D. has used threats as aforesaid, and that there is just cause to fear the execution thereof by him: we, therefore, command you that, immediately upon the receipt hereof, you bring the said C. D. before the said justice, at his office in *Ottawa* in said county, to give good and sufficient security, as well for his personal appearance at the next term of the circuit court to be held in and for said county, on the first day thereof, as also for his keeping the peace in the mean time towards all the people of this state, and particularly towards the said A. B. Witness, the said *Jabez Fitch*, Esquire, at Ottawa, in the said county, the day of 18 *Jabez Fitch.*

Form of warrant for good behavior.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county:

Whereas, A. B. hath this day personally appeared before *Jabez Fitch*, Esquire, one of the justices of the peace in and for said county, and made oath that he is afraid that C. D., of

in said county, will burn his house, [or "kill his cattle," or other injury threatened to the property according to the facts,] for that the said C. D. has lately threatened to burn his house, [or "kill his cattle," &c.] and hath demanded security for the good behavior against the said C. D., and the said justice of the peace being satisfied by the oath of the said A. B. that the said C. D. has used threats as aforesaid, and that there is just cause to fear the execution thereof by him:

We, therefore, command you that, immediately upon receipt hereof, you bring the said C. D. before the said justice in *Ottawa*, in said county, to give good and sufficient security as well for his personal appearance at the next term of the circuit court to be held in said county, on the first day thereof, as also for his being of good behavior in the meantime towards all the people of this state, and particularly towards the said C. D. Witness, the said *Jabez Fitch*, Esquire, at *Ottawa*, in the said county, the day of 18 *Jabez Fitch.*

Form of warrant for peace or good behavior on oath of two or more witnesses.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county:

Whereas, A. B. hath this day personally appeared before *Jabez Fitch*, Esquire, one of the justices of the peace in and for the said county, and made oath that he is afraid that the said C. D. will beat him, [wound, maim, kill, or do him some bodily hurt,] for that the said C. D. hath lately threatened to beat him, [wound, maim, kill, or do him some bodily hurt,] and hath demanded surety for the peace (or "for the good behavior") against the said C. D; (or "that he is afraid that the said C. D. will "burn his house" or "kill his cattle," for that the said C. D. hath lately threatened to "burn his house" or "kill his cattle," and hath demanded security for the good behavior against the said C. D.") And the said justice of the peace being satistisfied, by the oaths of the said A. B., and of G. H. and I. J., that the said C. D. has used threats as aforesaid, and that there is just cause to fear the execution thereof:

We, therefore, command you that, immediately upon the receipt hereof, you bring the said C. D. before the said justice, at his office in the town of *Ottawa*, in the said county, or before some other justice of the peace of the said county, to give good and sufficient security, as well for his personal appearance at the next term of the circuit court, to be held in said county, on the first day thereof, as, also, for his keeping the peace, (or "for his being of good behavior,") in the mean time, towards all the people in the state, and, particularly, towards the said A. B. Witness, the said *Jabez Fitch*, Esquire, at *Ottawa*, in the said county, the day of 18

Jabez Fitch.

Form of warrant for good behavior against a person not of good fame.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county:

Whereas, we are given to understand, by the information and testimony of A. B. and G. H., under oath, this day taken before *Jabez Fitch*, Esquire, one of the justices of the peace in and for the said county, that C. D., of *Ottawa*, in the said county, is not of good fame, but an evil doer, (or "a rioter, barrator," &c., or any one of these or the like causes,) and a common disturber of the peace, and have demanded that the said C. D. be required to give security for his good behavior, and the said justice of the peace being satisfied, by the oath of the said A. B. and G. H., of the bad character of the said C. D., and that he is not a person of good fame:

Therefore, we command you that, immediately upon receipt hereof, you bring the said C. D. before the said justice, at his office in the town of *Ottawa*, in the said county, to give good and sufficient security, as well for his personal appearance at the next circuit court to be held in and for the said county, on the first day thereof, as, also, for his being in good behavior, in the mean time, towards all the people of this state, according to the form of the statute in such case made and provided. Witness, the said *Jabez Fitch*, Esquire, at *Ottawa*, in the said county, the day of 18 *Jabez Fitch*.

Form of warrant for the peace upon a supplicavit.

State of Illinois, }
La Salle County, } ss. The people of the state of Illinois to any constable of said county:

Whereas, the writ of the people of the state of Illinois, issued out of, and under the seal of, the circuit court of *La Salle* county, has lately been directed and sent to *Jabez Fitch*, Esquire, one of the justices of the peace of the said county, and by him received, to compel C. D., of *Ottawa*, in the said county, to give good and sufficient security to keep the peace towards all the people of this state, and particularly towards A. B., for that the said A. B. hath made oath in said court, that the said C. D. hath lately threatened to beat [wound, maim, or kill, &c.,] him, and is afraid that the said C. D. will execute said threats, (*or the whole writ may be recited.*)

Therefore, we command you that, immediately upon receipt hereof, you cause the said C. D. to come before the said justice at his office in the town of *Ottawa*, in the said county, to give good and sufficient security, as well for his personal appearance at the next term of the circuit court, to be held in

and for the said county, on the first day thereof, as, also, for his keeping the peace, in the meantime, towards all the people of the state, and particularly towards the said A. B. Witness, the said *Jabez Fitch*, Esquire, at *Ottawa*, in the said county, the day of 18 *Jabez Fitch*.

This writ is seldom used, for, when application is made to the superior courts, they usually take the recognizance there.

Form of recognizance for the peace or good behavior.

State of Illinois, }
La Salle County, } ss. Be it remembered, that, on this day of 18 C. D. of *Ottawa*, in the said county, and E. F. and I. J. of in the said county, personally come before me, *Jabez Fitch*, Esquire, one of the justices of the peace in said county, and severally and respectively acknowledge themselves to owe to the people of the state of Illinois, to wit, the said C. D. the sum of dollars, and the said E. F. the sum of dollars, and the said I. J. the sum of dollars, to be respectively made and levied of their several goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the condition following:

The condition of this recognizance is such, that, if the said C. D. shall personally be and appear at the next circuit court, to be held in and for the said county of *La Salle*, on the first day thereof, to do and receive what shall then and there be enjoined on him by the court, and, in the mean time, shall keep the peace (or "be of good behavior") towards all the people of this state, and particularly towards A. B., then this recognizance to be void, else to remain in full force. C. D.
Taken, subscribed, and acknowledged } E. F.
the day and year first above written, } I. J.
before me *Jabez Fitch*. }

Form of mittimus for want of sureties.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county, and to the keeper of the common jail of said county:

Whereas, A. B. lately appeared before *Jabez Fitch*, Esquire, one of the justices of the peace of the said county, and made oath that he is afraid that C. D., of *Ottawa*, in said county, will [beat, wound, and kill him, for that the said C. D. hath lately assaulted him with a large knife, and threatened to plunge it through his heart and to kill him, at any rate,] or ("burn his house, for that the said C. D. hath lately threatened

to burn his house, and has actually attempted to set fire to the same;" *or, if for any other cause, here set it forth.*) And the said justice of the peace being satisfied, by the oath of the said A. B., (if there are two witnesses, then say "oaths of the said A. B. and E. F.,") that the said C. D. has used threats as aforesaid, has caused the said C. D. this day to be brought before him, and required him, the said C. D., to give good and sufficient security, as well for his personal appearance at the next term of the circuit court, to be held in and for the said county, on the first day thereof, as, also, in the mean time, for his keeping the peace (or "being of good behavior") towards all the people of this state, and particularly towards the said A. B.; and whereas he, the said C. D., hath refused, and doth now refuse, before the said justice of the peace, to find such security:

We, therefore, command you, the said constable, forthwith to convey the said C. D. to the common jail of the said county, and him deliver to the keeper thereof; and you, the said keeper, are hereby required to receive the said C. D. into your custody in the said jail for the want of sureties, and him there safely keep until he shall be discharged by due course of law. Witness, the said *Jabez Fitch*, Esquire, at *Ottawa*, in the said county, the day of 18

Jabez Fitch.

Form of a supersedeas.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any sheriff, constable, and all other persons in the said county:

Whereas, C. D. of *Ottawa*, in the said county, hath personally, come before *Jabez Fitch*, Esquire, one of the justices in and for the said county, and hath found good and sufficient security, that is to say, E. F. and I. J., both of *Ottawa*, in said county, either of whom hath undertaken for the said C. D., under the penalty of dollars, and he, the said C. D., hath undertaken for himself, under the penalty of dollars, that he, the said C. D., shall personally appear at the next term of the circuit court, to be held in and for the said county, on the first day thereof, and, in the mean time, to keep the peace (or "be of good behavior") towards all the people of this state, and particularly towards A. B.

We, therefore, command you, and every of you, that you forbear and surcease to arrest, take, and imprison him, the said C. D., and if you have, for the said occasion, and for none other, taken and imprisoned him, that then him you deliver, or cause to be delivered and set at liberty, without further delay. Given under the hand and seal of the said *Jabez Fitch*, Esquire, at *Ottawa*, in the said county, the day of 18

Jabez Fitch. [L. S.]

Form of release.

State of Illinois, }
La Salle county, } ss. Be it remembered, that A. B., of *Ottawa*, in the said county, on the day of 18 came before me, *Jabez Fitch*, one of the justices of the peace of the said county, and then remised and freely released to C. D. of *Ottawa*, in said county, the security for the peace (or "good behavior") by him, the said A. B., before me demanded against the said C. D. In testimony whereof I, the said *Jabez Fitch*, Esquire, have hereunto set my hand and seal, this day of 18 *Jabez Fitch*. [L. S.]

Or, if the release is given before another justice, then say, "the security for the peace (or 'good behavior') which he has against C. D., of *Ottawa*, in the said county. In testimony," &c.

The release will not discharge the recognizance or the appearance of the party bound thereby, but that he must appear according to the condition thereof for the safeguard of his recognizance; yet it will be good inducement to the court into which the recognizance is certified to discharge it.

Form of liberate to discharge one committed for want of sureties.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to the keeper of the common jail of said county:

Whereas, C. D., who is now in the common jail in your custody, at the suit of A. B. of *Ottawa*, in said county, for not giving good and sufficient security as well for his personal appearance at the next term of the circuit court to be held in the said county, on the first day thereof, as, also, for his keeping the peace, (or "being of good behavior,") in the mean time, towards all the people of this state, and particularly towards the said A. B., hath given, before *Jabez Fitch*, Esquire, one of the justices of the peace in the said county, good and sufficient securities that he will personally appear at the next circuit court to be held in and for the said county, on the first day thereof, and will well and truly keep the peace, (or "be of good behavior,") in the mean time, towards all the people of this state, and particularly towards the said A. B.

We, therefore, command you that, if the said C. D. do remain in the said jail for the said cause, and none other, then you forbear to detain him any longer, but that you deliver him thence and suffer him to go at large, and that upon the penalty that will fall thereon. Given under the hand and seal of the said justice, at *Ottawa*, in the said county, the day of 18 *Jabez Fitch*. [L. S.]

CHAPTER X.

OF FUGITIVES FROM JUSTICE—OF OFFENDERS UNDER THE LAWS OF THE UNITED STATES—AND OF THE DELIVERING UP PERSONS HELD TO SERVICE OR LABOR, ESCAPED FROM ONE STATE TO ANOTHER.

1. OF FUGITIVES FROM JUSTICE.

The duty of one nation to arrest and deliver up to another fugitives from justice who have committed felony or other high crimes in the nation from which they had fled, has been long recognized as resting on plain principles of justice and public utility. Such is the law of nations, which has been frequently declared to be part of the common law of England. 1 *Kent's Com.*, 37. 3 *Burr*, 1481. 4 *Burr*, 2016. This law or usage of nations, it seems, extended only to high crimes; but the exact degree of criminality, or the particular crimes, were not defined.

By Art. IV., Sec. 2. of the constitution of the United States, it is declared that "a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

The offences committed by fugitives from other states over which justices of the peace have cognizance, have been specially defined by the legislature of this state.

By the 4th sec. of an act concerning fugitives from justice, *Gale's Stat.*, 318, it is provided that, "Whenever any person within this state shall be charged upon the oath or affirmation of any credible witness, before any judge or justice of the peace, with the commission of any murder, rape, robbery, burglary, arson, larceny, forgery, or counterfeiting, in any other state or territory of the United States; and that the said person hath fled from justice, it shall be lawful for the said judge or justice to issue his warrant for the apprehension of said person. If upon examination it shall appear to the satisfaction of such judge or justice, that the said person is guilty of the offence alleged against him, it shall be the duty of the said judge or justice to commit him to the jail of the county; or if the offence is bailable, according to the laws of this state, to take bail for his appearance at the next circuit court to be holden in that county. It shall be the duty of the said judge or justice to reduce the examination of the prisoner

and those who bring him, to writing, and to return the same to the next circuit court of the county where such examination is had, as in other cases, and shall also send a copy of the examination and proceedings to the executive of this state, so soon thereafter as may be."

By the 7th sec. of the same act it is provided that, "In all cases where complaint shall be made as aforesaid against any fugitive from justice, it shall be the duty of the judge or justice to take good and sufficient security for the payment of all costs which may accrue from the arrest and detention of such fugitive; which security shall be by bond, to the clerk of the circuit court, conditioned for the payment of costs as above; which bond, together with the statement of the costs, which may have accrued on the examination, shall be returned to the office of the clerk of the circuit court."

The proceedings under this act differ, in some respects, from the cases of offences committed within the state, and, in relation to the examination of the prisoner and the witnesses, are similar to the proceedings under the English statute.

In the case of fugitives from justice, it will be perceived that it is the duty of the justice to reduce the examination of the prisoner and those who bring him to writing, and to return the same to the circuit court, and to send a copy to the executive of this state; and security for the payment of all costs which may accrue from the arrest and detention of the fugitive, is to be required by the justice, the bond to be in the name of the clerk of the circuit court. With these exceptions, the proceedings are similar to those under the act for the apprehension of persons for offences committed in this state.

The examination of the witnesses on the part of the prosecution is to be on oath, in the presence of the prisoner, who has a right to cross examine them. The justice is to reduce the evidence of the witness to writing, in a plain and intelligible manner, and, as nearly as possible, in the language in which it was delivered. And the whole evidence should be put down, as well that which is in favor of as that which is against the prisoner, and not merely so much as will show that the offence is within the jurisdiction, and justifies the commitment of the offender. It would not, however, be necessary to put down statements made by the witnesses which are totally foreign to the inquiry. 1 *Chit. Crim. Law*, 79.

After the examination of a witness is taken and put in writing, it should be read to him and corrected, and then signed by him and certified by the justice.

The above observations as to the taking the evidence on the part of the prosecution, equally apply to the evidence taken on the part of the prisoner.

The examination of the prisoner must be entirely voluntary, and it ought not to be on oath; and when sworn, it has, for

that cause, been rejected as evidence against him. 1 *Chit. Crim. Law*, 86.

There should be no improper influence, either by threats, promise, or misrepresentation, employed by the justice, nor should he permit any; for, however slight the inducement may have been, a confession so obtained cannot be received as evidence, on account of the uncertainty and doubt whether it was not made rather from a motive of fear or interest than from a sense of guilt. 1 *Chit. Crim. Law*, 85.

If there be more than one person accused, it is important that they should be examined apart, in order that an opportunity may be afforded of detecting any variation in their story. 1 *Chit. Crim. Law*, 88.

The usual practice is to take the examination of the prisoner after the complainant and the witnesses on the part of the prosecution have been examined.

With respect to the examination of the prisoner himself, it has been observed, that the statutes of Philip and Mary were the first warrant given for the examination of a felon by the English law. For, at the common law, the guilt of an offender was not to be wrung out of himself, but rather to be discovered by other means and other men; and, though the statutes just noticed authorize an examination, they are not compulsory on the prisoner to accuse himself. There is no mode of extorting a statement from the accused. Indeed, the examination has been considered rather as a privilege in his favor. 1 *Chit. Crim. Law*, 84.

It is, also, important that great care should be taken in reducing the examinations of the prisoner and witnesses to writing, because it is from the inspection of a copy of them that the executive is to determine whether the finding an indictment would be warranted, and whether the prisoner is to be sent to another state for trial.

Form of oath to be administered to witnesses.

You do swear by the everliving God, that you will true answers make to such questions as may be asked you touching the present complaint against C. D. So help you God.

Form of affirmation.

You do solemnly, sincerely, and truly declare and affirm, that you will make true answers to such questions as may be asked you touching the present complaint against C. D. And this you do under the pains and penalties of perjury.

Form of bond for costs.

Know all men by these presents, that we, A. B., E. F., and

G. H., of in the county of and state of Illinois, are held and firmly bound unto *Lorenzo Leland*, clerk of the circuit court of *La Salle* county, in said state of Illinois, and to his successors in office, in the penal sum of dollars, to be paid to the said clerk as aforesaid, or his successors in office, to which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators firmly, by these presents, sealed with our seals, dated this day of in the year of our Lord one thousand eight hundred and forty

Whereas, the said A. B. has this day made complaint, on oath, against C. D., before *William T. Bayley*, Esquire, a justice of the peace of the said county of *La Salle*, that the said C. D., on the day of 18 at in the county of and state of Ohio, (set out the offence,) and that the said C. D. hath fled from justice, and has prayed that a warrant issue for the apprehension of the said C. D.

Now, therefore, the condition of the above obligation is such, that, if the said A. B. shall well and truly pay all costs which may accrue from the arrest and detention of the said C. D., then the above obligation to be void, otherwise to be and remain in full force and effect. [L. S.]

Executed and delivered in the presence of *William T. Bayley.* [L. S.] [L. S.]

Form of warrant.

State of Illinois, }
La Salle county, } ss. The people of the State of Illinois to any constable of the said county :

Whereas, A. B. hath this day made complaint, on oath, (or affirmation,) before *William T. Bayley*, Esquire, one of the justices of the peace of the said county, that C. D., on the day of 18 at in the county of and state of *Ohio*, (here set out the offence,) and that the said C. D. hath fled from justice :

We, therefore, command you forthwith to take said C. D. and bring him before the said *William T. Bayley*, Esquire, to be dealt with according to law. Hereof fail not at your peril. Witness, the said *William T. Bayley*, Esquire, at *Ottawa*, in the said county, the day of 18

William T. Bayley. [L. S.]

Form of examination of witnesses.

State of Illinois, }
La Salle county, } ss. The examination of A. B., G. H., and I. J., taken upon oath before me, *William T. Bayley*, Esquire, a justice of the peace of the said county of *La Salle*, on

the day of 18 in the presence and hearing of C. D., charged before me, by the said A. B., with, on the day of 18 at in the county of , and state of *Ohio*, feloniously stealing, taking, &c., (set out the offence as in the warrant,) and with having fled from justice.

The said A. B., on the part of the prosecution, on his oath aforesaid, before me, the said justice, in the presence and hearing of the said C. D., saith (set forth the evidence of A. B.)

The said G. H., on the part of the prosecution, on his oath aforesaid, before me, the said justice, in the presence and hearing of said C. D., saith, (here set forth the evidence of G. H.)

The said I. J., on the part of the said C. D., on his oath aforesaid, before me, the said justice, in the presence and hearing of the said C. D., saith, (here set forth the evidence of I. J.)

Taken before me, the day and year first above mentioned. *William T. Bayley.* } A. B. G. H. I. J.

Examination of prisoner.

State of Illinois, }
La Salle county, } ss. The examination of C. D., taken before me, *William T. Bayley*, Esquire, a justice of the peace of the said county, on the day of 18 the said C. D. being charged by A. B. with (set out the offence, and fleeing from justice, as in the examination of witnesses.) He, the said C. D., upon his examination now taken before me, saith, that (here set out prisoner's statement.)

Taken before me, the day and year first above mentioned. *William T. Bayley.* }

There does not seem to be any object in sending to the executive anything besides a copy of the examination of the witnesses and of the prisoner; but, as a copy of the examination and *proceedings* are required by the statute, it would be advisable to send a copy of the warrant, commitment, or recognizance, as the case may be, certified under the hand of the justice as follows:

State of Illinois, }
La Salle county, } ss. I, the subscriber, a justice of the peace in and for the county aforesaid, do hereby certify that the above is a true copy of the examination and proceedings had and taken before me. *William T. Bayley.*

For forms of commitments, recognizance, subpœnas, and attachments against witnesses, &c., those heretofore given in chapter VIII. will answer, with slight alterations so as to con-

form to the facts. The recognizance will, of course, not be to answer to an indictment, otherwise it will be like the form in chapter VIII.

2. OF OFFENCES UNDER THE LAWS OF THE UNITED STATES.

By the 33d section of an "*Act to establish the Judicial Courts of the United States*," approved Sept. 24, 1789, it is provided, "That for any crime or offence against the United States, the offenders may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States where he may be found, agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested, and imprisoned, or bailed, as the case may be, for trial before such court of the United States, as by this act has cognizance of the offence: And copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses, for their appearance to testify in the case; which recognizances the magistrate, before whom the examination shall be, may require on pain of imprisonment. And if such commitment of the offenders, or the witnesses, shall be in a district other than that in which the offence is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offenders and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had. And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which case it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of the district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law. And if a person committed by a justice of the supreme, or a judge of a district court, for an offence not punishable with death, shall afterwards procure bail, and there be no judge of the United States in the district to take the same, it may be taken by any judge of the supreme, or superior court of law of such state."

Sect. 9. "That the district courts shall have, exclusively of the courts of the several states, cognizance of all crimes and offences, that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted." The residue of this section re-

lates to civil jurisdiction, and *qui tam* actions in relation to the revenue, &c.

Sect. 11, after defining the civil jurisdiction of the circuit courts, says, "And shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts, of the crimes and offences cognizable therein."

The forms of oaths and affirmations to be administered to complaining witnesses, should be the same as in the case of fugitives from justice. *Ante* 153.

Form of warrant.

United States of America, }
District of *Illinois*, } ss. United States of America to any constable of the county of *Ogle:*

Whereas, A. B. hath this day made complaint, on oath, [or affirmation,] before *Salmon C. Cotton*, Esquire, one of the justices of the peace in and for said county, that on the day of in the year of our Lord one thousand eight hundred and at in the said county of *Ogle*, and state of *Illinois*, C. D. did (here set out the offence):

You are, therefore, commanded forthwith to take the said C. D. and bring him before the said justice of the peace, or, in case of his absence, before some other justice of the peace in the said county of *Ogle*, to be dealt with according to law. Hereof fail not at your peril. Witness, *Salmon C. Cotton*, Esquire, at *Grand de Tour*, in said *Ogle* county, the day of 18 *Salmon C. Cotton.*

Form of a recognizance of a prisoner.

United States of America, }
District of *Illinois*, } ss. Be it remembered that, on the day of in the year of our Lord one thousand eight hundred and C. D. of the county of *Ogle*, and E. F. and G. H. of in the said county of *Ogle*, personally come before me, *Salmon C. Cotton*, Esquire, one of the justices of the peace in and for the said county of *Ogle*, and severally and separately acknowledge themselves to owe to the United States of America, that is to say, the said C. D. the sum of *four hundred* dollars, and the said E. F. and G. H. each the sum of *two hundred* dollars, separately to be made and levied of their respective goods and chattels, lands and tenements, to the use of the said United States of America, if default shall be made in the condition following:

The condition of this recognizance is such, that if the said

C. D. shall personally appear on the first day of the next term of the circuit court of the United States of America, in the district of Illinois, (or "of the district court of the United States of America, to be held at Springfield, in the district of Illinois,") to answer to an indictment to be preferred against him for (here state the offence,) and to do and receive what shall by the said court be then and there enjoined upon him, and shall not depart the court without leave, then this recognizance to be void, or else to remain in full force.

Taken, subscribed, and acknowledged the day and year first above written, before *Salmon C. Cotton.* — C. D. E. F. G. H.

For forms of mittimus, recognizance of witnesses to give evidence, &c., see chapter VIII. The forms in that chapter may, with slight alterations, be made applicable to the proceedings under this law of the United States.

3. OF DELIVERING UP PERSONS HELD TO SERVICE, OR LABOR, WHO HAVE ESCAPED FROM ONE STATE TO ANOTHER.

By the 2d section of the 4th article of the constitution of the United States it is provided, that "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor may be due."

By the 6th article, the constitution, and the laws of the United States made in pursuance thereof, are declared to be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution and laws of any state to the contrary notwithstanding.

In pursuance of the authority thus vested, congress passed a law, February 12, 1793, which provides, by

"Sec. 3. That when a person, held to labor in any of the United States, or in either of the territories on the northwest or south of the river Ohio, under the laws thereof, shall escape into any other of the said states or territory, the person to whom such labor or service may be due, his agent, or attorney, is hereby empowered to seize or arrest such fugitive from labor, and to take him or her before any judge of the circuit or district courts of the United States, residing or being within the state, or before any magistrate of a county, city, or town corporate, wherein such seizure or arrest shall be made; and, upon proof to the satisfaction of such judge, or magistrate, either by oral testimony, or affidavit, taken before and certified by a magistrate, of any such state or territory that the person so seized or arrested, doth, under the laws of the state or territory from which he or she fled, owe service or labor to

the person claiming him or her, it shall be the duty of such judge or magistrate, to give a certificate thereof to such claimant, his agent or attorney, which shall be sufficient warrant for removing the said fugitive from labor, to the state or territory from which he or she fled.

"Sec. 4. That any person who shall knowingly and willingly obstruct or hinder such claimant, his agent, or attorney, in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, his agent, or attorney, when so arrested, pursuant to the authority herein given or declared, or shall harbor or conceal such person, after notice that he or she was a fugitive from labor, as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars, which penalty may be recovered by, and for the benefit of such claimant, by action of debt, in any court proper to try the same; saving, moreover, to the person claiming such labor or service, his right of action for, or on account of the said injuries, or either of them."

Form of an application to a justice of the peace for a certificate to remove a fugitive from labor to the state from which he fled.

United States of America, }
District of *Illinois*, } ss. To *Charles H. Gilman*, Esquire, one of the justices of the peace within and for the county of *La Salle*, and state of *Illinois:*

A. B. (or C. D., agent or attorney of A. B., of) of informs and gives the said justice to understand, that one E. F. is a person held to labor in the state of *Missouri*, under the laws thereof; that the said E. F. has escaped from the said state of *Missouri*, into the said state of *Illinois;* and that the said A. B. is the person to whom the labor and service of the said E. F. is due; and that he has seized and arrested the said E. F., being such fugitive from the labor and service of him, the said A. B., as aforesaid; and that he now hath the said E. F. here before the said justice, to be proceeded with according to the statute of the United States, in such case made and provided. The said A. B., therefore, prays that, upon legal proof to the satisfaction of said justice that the said E. F. doth, under the laws of the said state of *Missouri*, from which he fled, owe service and labor to the said A. B., (and if by agent or attorney, add "that the said C. D. is the agent (or attorney) of said A. B.") said justice will give him a certificate thereof, to authorize and empower him to remove the said E. F. to the state from which he fled, as before stated. Dated at Troy Grove, in the said county and state of *Illinois*, this day of 18

Upon legal proof of the statement in the above application,

as required in the act of congress, it will be the duty of the justice to grant the certificate prayed for.

Form of the certificate.

United States of America, }
District of *Illinois*, } ss. To all people to whom this certificate shall come:

Know ye, that on the day of in the year of our Lord one thousand eight hundred and forty A. B., (or C. D. agent (or attorney) of A. B., of) of informed and gave me, the undersigned, a justice of the peace of said county, to understand that (here set out the application at large.)

Whereupon, upon due enquiry, and legal proof being made to me, the said justice, and to my satisfaction, that the facts stated by the said in his said application, are true, and the premises by me, the said justice, being fully understood, I do hereby, in pursuance of the law of the United States, entitled "*An act respecting fugitives from justice, and persons escaping from the service of their masters*," give to the said A. B. a certificate thereof, to wit, that the said E. F., the person named in the said application, doth, under the laws of the said state of *Missouri*, owe labor and service to the said A. B., and that he hath escaped from the said state of *Missouri* into the said state of *Illinois*, (that the said is the agent, or *attorney*, of the said A. B.,) and that the said A. B. is authorized, and hath sufficient warrant, by virtue of the statute aforesaid, to remove the said E. F. from the said state of *Illinois* to the said state of *Missouri*, from which he fled.

Given under my hand and seal at in the county of and state of *Illinois*, this day of in the year of our Lord one thousand eight hundred and forty

Charles H. Gilman, justice of the peace for the county of and state of *Illinois*.

CHAPTER XI.

OF SEARCH WARRANTS.

By "*An act to regulate the apprehension of offenders, and for other purposes*," sec. 11, it is provided that "It shall be lawful

for any judge or justice of the peace, upon complaint made before him upon oath or affirmation that a larceny had been committed, and that the person affirming or swearing does verily believe that the stolen goods or other property, are or is concealed in any dwelling-house, out-house, garden, yard or other place or places, to issue a warrant under his hand commanding every such dwelling-house or place to be searched in the day time, and if any of the goods described in any such warrant be found therein, then that the said goods be seized and brought before the judge or justice issuing said warrant." *Gale's Stat.*, 240.

The search warrant is not to be granted without oath made before the justice, that the party complaining has probable cause to suspect his property has been stolen and is concealed in such a place, and showing his reasons for such suspicion. 1 *Chit. Crim. Law*, 65. The justice ought not to issue a search warrant upon light suspicion: the facts and circumstances proved should be such as would convince any impartial and disinterested person that the goods have been stolen and are concealed in the place suspected. Lord Hale says, it is convenient that such warrant do require the search to be made in the day time, and though I will not affirm (says he) that they are unlawful without such restriction, yet they are very inconvenient without it, for many times, under pretence of searches made in the night, robberies and burglaries have been committed, and, at best, it creates great disturbances. 2 *Hale*, 150. Yet it is said that in England, in case not of probable suspicion only, but of positive proof, it is right to execute the warrant in the night time. 1 *Chit. Crim. Law*, 65. But a search warrant issued under our statute requires the officer to make the search in the day time.

A general warrant to search all separate places is not good, for these warrants are judicial acts, and must be granted upon examination of the facts. 4 *Burn's Justice*, 130. Such a general warrant is not justifiable, for it makes the party to be in effect the judge, and a search made by pretence of such a warrant gives no more power to the officer or party than what they may do by law without them. 2 *Hale*, 150.

By the constitution of this state, Art. VIII., Sec. 7, it is declared "That the people shall be secure in their persons, houses, papers, and possessions from unreasonable searches and seizures; and that general warrants whereby an officer may be commanded to search suspected places without evidence of the fact committed, or to seize any person or persons not named whose offences are not particularly described and supported by evidence are dangerous to liberty, and ought not to be granted."

It appears that it is not essential to the validity of a warrant that it should state in whom the property of the goods was at the time they were stolen; for a person may even be indicted

and convicted of stealing the goods of a person unknown. 10 *Johns. R.*, 263. 2 *Wils.*, 275.

The warrant ought to be directed to an officer and not to a private person, though it is proper that the party complaining should attend the officer in the execution of the warrant, because he knows his goods and will be able to identify them. 4 *Burn's Justice*, 131.

Whether the stolen goods are in a suspected house or not, the officer and his assistants in the day time may enter, the doors being open, to make search, and it is justifiable by the warrant. If the door be shut and, upon demand, it be refused to be opened by them within, if the stolen goods be in the house, the officer may break open the door. And so he may break open boxes which are locked, after demanding the keys, 4 *Burn's Justice*, 132. 1 *Chit. Crim. Law*, 66, for such warrants are often indispensable to the detection of crimes, and would be of little or no efficacy without this power attached to them. 2 *Hale*, 151. If the goods be not in the house, &c., yet it seems the officer is excused that breaks open the door to search, because he searched by warrant, and could not know whether the goods were there, till search was made. 4 *Burn's Justice*, 132. 2 *Hale*, 151.

But it is said that, as to the party upon whose suggestion the warrant issued, the breaking of the door is according to the event lawful or unlawful, to wit, lawful if the goods are there, unlawful if not there. 2 *Hale*, 151. 3 *Wils.*, 434.

This doctrine may very well be doubted. The party making complaint that a larceny had been committed and that the goods are concealed in a particular place, states under oath the facts and circumstances upon which the complaint is grounded, and, upon consideration of the case presented to him, the justice determines as to the propriety of issuing a warrant. This is in the nature of an adjudication, and is a protection to all persons acting under it. If a person is arrested under a suspicion of felony, it is upon the *exparte* oath of the complainant, yet the prosecutor is not liable to an action for the arrest of the defendant, although he may be discharged by the justice before whom he is brought. So in a civil suit where a capias is issued upon the oath of the plaintiff and the defendant arrested, who succeeds upon the trial in showing that the plaintiff had no cause of action, still he is not liable to an action for the arrest.

And the older authorities, holding that the party procuring a warrant to search for stolen goods is liable to an action if the doors are broken and the goods are not there, seem to be overruled.

In Booth *v.* Cooper *et al.*, in trespass, 3 *Esp. R.*, 135, the defendants were excise officers and searched the plaintiff's house by virtue of a warrant issued by the commissioners of

excise, and the plaintiff recovered. On error, Lord Mansfield, upon the argument, desired the counsel to see if there was any authority in the books for the dictum of Lord Hale, and the case of Bostwick *v.* Saunders, 3 *Wils R.*, 434, was referred to. In giving the opinion of the court, Lord Mansfield said the case was like that of Bostwick *v.* Saunders, but they could not concur in it; that the excise officers could not be guilty of trespass in *procuring* or executing a warrant.

In trespass by Beaty against Perkins, who had procured a search warrant and went with the officer and searched the house of the plaintiff for clover seed, which was not found, it was held by the supreme court of the state of New York, upon a review of the authorities and cases, that the action could not be sustained. The warrant having been legally and regularly issued, and duly executed in the day time, is a protection to the party who procures it as well as to the officer who executes it, in an action of trespass. 6 *Wend. R.*, 382.

But, if a party shall act maliciously in obtaining a search warrant, he will be liable to a special action on the case, 1 *Chit. Crim. Law*, 66, and, if there is a want of probable cause, to an action for a malicious prosecution. 2 *Johns. R.*, 203.

Sec. 11. "If upon examination of witnesses before the judge or justice of the peace who issued said warrant, it shall be determined by such judge or justice that the goods so brought before him have been stolen, it shall be the duty of such judge or justice either to keep possession of, or deliver, or cause to be delivered, such goods to the sheriff of the proper county, there to remain until the conviction of the thief, or the claimant's right be otherwise legally ascertained. If the thief shall not be indicted at the next circuit court after the goods shall be seized, and an action shall not be commenced against the person or persons in whose possession such goods shall have been found for the recovery thereof within one month after a circuit court shall have been held after such seizure, the said circuit court shall, at their next session, order such goods to be re-delivered to the person in whose possession they were found, which order shall be obeyed by the person in whose possession such goods may at the time be.

"In case the judge or justice of the peace shall, upon such examination as aforesaid, determine that such goods so seized had not been stolen, then the goods shall be immediately restored to the person from whose possession they were so taken." *Gale's Stat.*, 240.

Upon the return of the warrant to the justice, with the goods which have been seized by virtue thereof, the justice is authorized to take the examination of witnesses, and, it is presumed that, as incident to this authority, he has power to issue process to compel their attendance before him to testify.

Form of oath of complaint.

You do swear by the everliving God, that you will true answers make to such questions as may be put to you touching the present complaint and application for a search warrant. So help you God.

Form of affirmation.

You do solemnly, sincerely, and truly declare and affirm, that you will true answers make to such questions as shall be put to you touching the present complaint and application for a search warrant. And this you will do under the pains and penalties of perjury.

Form of search warrant.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to the sheriff or any constable of said county:

Whereas, A. B. hath this day made complaint, on oath, before *John Palmer*, Esquire, one of the justices of the peace of the said county, that on the day of 18 in the county aforesaid, divers goods and chattels of the said A. B., that is to say, (*describe the stolen articles accurately,*) were feloniously stolen, taken, and carried away, by some person or persons unknown, (or by C. D.,) and he does verily believe that the said goods and chattels, or some part thereof, are concealed in the dwelling house now occupied by C. D., (*describe the place with certainty according to the fact,*) situate in in the said county.

We, therefore, command you, with necessary and proper assistance, to enter, in the day time, into the said dwelling house, (*the place above described,*) and there diligently search for the said goods and chattels; and if the same, or any part thereof, shall be found upon such search, that you bring the goods and chattels so found before the said justice to be disposed of according to law. Witness, the said *John Palmer*, Esquire, at *Ottawa*, in the said county, the day of 18 *John Palmer.*

Subpœna to a witness to give evidence.

State of Illinois, }
La Salle county, } ss. The people of the State of Illinois to the sheriff or to any constable of the said county:

Whereas, complaint hath been made, on oath, by A. B., before *John Palmer*, Esquire, a justice of the peace of the said county, (here set out the larceny and the concealment of

the property as in the warrant;) and it appearing that the said goods and chattels have been brought before the said justice, and that G. H. is a material and necessary witness to be examined concerning the stealing of the same:

We, therefore, command and require you to summon the said G. H. to appear before the said justice, at his office in in the county aforesaid, forthwith (or "on the day of 18 at o'clock in the noon,") to testify the truth, according to his knowledge, concerning the premises. Witness, the said *John Palmer*, Esquire, at *Ottawa*, this day of 18

John Palmer,
Justice of the peace.

Warrant for a witness.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to the sheriff or to any constable of the said county:

Whereas, complaint hath been made, on oath, before *John Palmer*, Esquire, a justice of the peace of the said county, by A. B., that (here set out the larceny, and the concealment of the property as in the warrant) and that G. H. is a material and necessary witness to be examined concerning the stealing of the same, and it appearing that said goods and chattels have been brought before the said justice:

We, therefore, command and require you to cause the said G. H. forthwith to come before the said justice to give such information and evidence as he knoweth concerning the premises. Witness, the said *John Palmer*, Esquire, at *Ottawa*, in the county aforesaid, this day of 18

John Palmer.

Form of record.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 A. B. appeared and made complaint, on oath, before me, *John Palmer*, a justice of the peace of said county, that, on the day 18 at in the said county, divers goods and chattels of the said A. B., that is to say, one gold watch and six silver tea spoons, (*describe the articles stolen*,) were feloniously stolen, taken, and carried away by some person or persons unknown, (or "by C. D.,") and, that he verily believes that the said goods and chattels, or some part thereof, were concealed in the dwelling house then occupied by C. D., (*the place described in the warrant*,) situate in in the said county; whereupon I, the said justice, issued a warrant to the sheriff or any consta-

ble of the said county, to enter and diligently search the said dwelling, (*the place described,*) in the day time, for the said goods and chattels, and if any of them should be found, to seize the same and bring them before me to be disposed of according to law.

That, afterwards, on the day of 18 R. S., one of the constables of the said county, returned the said warrant, and therewith brought before me the goods and chattels therein described; whereupon I did, immediately, (or "on the day of 18) proceed to the examination of all witnesses produced before me touching the said complaint, and, after considering the proofs adduced, I did adjudge and determine that the said goods and chattels had been stolen, (or "had not been stolen.")

And I did, therefore, deliver the said goods and chattels to the sheriff of the said county, there to remain until the conviction of the thief, or the claimant's right be otherwise ascertained.

Or, if the justice keeps the goods, &c., then say:

And I did, thereupon, retain and keep possession of the said goods and chattels, so that they should remain with me until the conviction of the thief, or the claimant's right be otherwise legally ascertained.

If the justice determines that the goods, &c., were not stolen, then say:

And did, thereupon, immediately restore to the said C. D. the said goods and chattels, from whose possession they were so taken.

In witness whereof, I, the said *John Palmer*, justice as aforesaid, have hereunto set my hand, this day of 18 at in the county aforesaid. *John Palmer.*

PART III.

OF THE POWERS AND DUTIES OF JUSTICES OF THE PEACE UNDER PARTICULAR STATUTES.

CHAPTER I.

OF THE PROCEEDINGS IN CASES OF SUMMARY CONVICTIONS.

Justices of the peace were originally mere conservators of the peace, and had no jurisdiction or authority at all, either to convene the offender before them, or to examine, hear, or determine the cause, but had only coercion or punishment of an offender in some few cases. *Dalt. Justice*, 24.

Power, however, was very early given to conservators of the peace for suppressing riots and affrays, for taking sureties for the peace, and for apprehending felons, and other inferior criminals, 1 *Bl. Com.*, 354, and securing their appearance to take their trial for the alleged offences before a higher tribunal.

Such was the power conferred upon justices of the peace in this state by the act of Feb. 19, 1819. *Ante*, 11.

Two or more justices of the peace were empowered to hear and determine all felonies and other offences at the sessions. And, in some cases, one justice could hear and determine offences, and punish an offender as convict upon his own view, or upon confession, or upon examination and proof of witnesses. *Ante*, 3, 4.

By several acts of the legislature of this state, judicial power has been conferred upon one or two justices of the peace to hear and determine in a variety of cases over which they had no jurisdiction by the common law, as in cases of assault and battery, differences between master and apprentice, &c. And, by some of the statutes, a mere ministerial power is given to them, as for taking the acknowledgment or proof of deeds and mortgages, &c.

It is to be regretted that some uniform system of practice is not observed for enforcing the different statutes committed to the charge of justices of the peace, when acting in a judicial capacity. The extensive and important duties which have been imposed upon them, and the various and complicated rules by which they are to be governed in the performance of those duties, render the discharge of them laborious, and often difficult. Although but little inconvenience has been experienced in procuring incumbents who are qualified to discharge

the various functions of this important office, yet it seems to be an object worthy of attention that the rules of proceeding should be as simple and plain as the nature of the duties will admit. By the increase of population, as well as the increase of legislation, the amount of business in the courts of justices of the peace is greatly increasing. And it is on account of the small expense incident to the proceedings in these courts, and the ease and despatch with which business is there determined, that the legislature has been induced to extend the authority and jurisdiction of justices of the peace.

Here it may be remarked, that justices of the peace cannot be too circumspect when called upon to discharge any of the various duties of their office. Instances have been known where individuals, feeling themselves aggrieved, have resorted to some neighboring justice and related in detail the facts attending their case, giving them a coloring, occasioned, perhaps, by an honest resentment, or, perhaps, by malicious design, and thereby biased the mind of the justice. There are many ways in which the human mind may be affected, of which the justice may be in no way sensible. Such influences are the more dangerous, as the justice is not aware of this effect upon him, and, therefore, takes no pains to guard against it. Whenever a justice shall perceive that the facts of a case have been related to him, and he shall feel an inclination in favor of one party more than another, it would be well for him to decline issuing process. It is reprehensible in any individual who shall have made the justice acquainted with his case, to attempt to ascertain his opinion relative to it, for the purpose of determining whether to institute proceedings before him.

The justice to whom application is made for process, ought not to express any opinion in the case before it comes before him to be tried, because his impartiality will, by that means, be affected, and he will feel an anxiety to support those which he has thus prematurely expressed. 1 *Chit. Crim. Law*, 696. Under such circumstances, there is not only pride of opinion to contend against, but the fear of the censure of the party who may have relied upon the correctness of the opinion expressed by the justice.

After the proceedings are commenced, it is not unusual that the parties are desirous to compromise.

It seems that, any time before judgment is finally pronounced, the courts have power, in cases of misdemeanors which more particularly affect a private individual, to allow a compromise, in order to render some satisfaction to the party immediately injured, and to save the trouble and circuity of a civil action. If the prosecutor declares himself satisfied, it is usual to inflict but a trifling fine for the injury to the public welfare. 1 *Chit. Crim. Law*, 664. 11 *East*, 46. 1 *Cond. Eng. Ch. R.*, 502.

The practice of entrusting inferior courts with the power of allowing a compromise, has been censured, as it is

said that prosecutions for assaults are more frequently commenced in those courts for private lucre, than the ends of public justice. 4 *Bl. Com.*, 364.

But it may be urged, on the other hand, that justices of the peace, from their local knowledge and more accurate acquaintance with the character of the parties, are more fit to be entrusted with the peace than the judges of the circuit courts, who generally know little more than the facts detailed in the evidence. 1 *Chit. Crim. Law*, 8.

A sum agreed to be paid as a compromise for a private misdemeanor, where the compromise was made with the sanction of the court before which the prosecution was instituted, may be recovered in an action at law. 2 *Burr*, 719. 5 *East*, 294. 7 *Term R.*, 475.

Bastardy is, in law, but a misdemeanor, which may be compromised or compounded at the discretion of the parties. 3 *Scam. R.*, 378.

Although it is no part of the office of justices of the peace to forbid lawful suits, yet they would do well to be mediators of peace in such suits and controversies as shall arise among their neighbors. *Dalt. Justice*, 10.

And it would not be amiss that justices of the peace should bear in mind the charge given by King James to the judges, "that they do justice uprightly and indifferently, without delay, partiality, fear, or bribery, with stout and upright hearts, with clean and uncorrupt hands, and yet not to utter their own conceits, but the true meaning of the law, not making laws but interpreting the law, and that according to the true sense thereof, and after deliberate consultation, remembering that their office is to declare and not to give the law."

By a statute of this state, justices of the peace are invested with original exclusive jurisdiction in all cases of assault, assault and battery, and affrays.

It is sometimes the case, that persons guilty of these offences go before a justice of the peace and confess themselves guilty, and pay a small and inadequate fine for the purpose of preventing or barring process founded upon the complaint of the injured party. And, with the same design, it has been the practice for a friend of the offender to institute a colorable prosecution. This practice, it is said, has, in some instances, been encouraged and approved by members of the profession. Attempts, however, of this kind are usually abortive, for, in general, the proceedings in consequence of them are of no validity unless they are made and obtained *bona fide*. Whenever, therefore, applications of this nature are made to a justice, he ought, generally, to decline acting upon them at all, but never in the absence of, or without notice to, the party injured. A sentence thus obtained is no bar to another prosecution for the same complaint. The general effect of such proceedings is nothing more than to show the consciousness of guilt on the

part of the offender, and the want of judgment and, sometimes, integrity on the part of the justice. And when the case is as it has been known to be, that there is an understanding, or rather a combination, between the party and the justice to prevent, in this way, the due course of justice, they are both liable to a public prosecution. *Davis' Justice*, 21.

The general rules relating to summary proceedings will be considered under the following heads, to wit:

1. Of the complaint or information.
2. Of the summons and warrant.
3. Of the service thereof.
4. Of securing the attendance of witnesses.
5. Of the appearance.
6. Of the adjournment.
7. Of the hearing and trial.
8. Of the conviction and judgment.
9. Of enforcing the conviction and judgment.

1. *Of the complaint or information.*

There does not appear to be any general enactment regulating proceedings before justices of the peace under the different statutes, and establishing a uniform set of rules to be observed in all cases, with appropriate variations when necessary. From the want of these, it will be found that the proceedings are very different. Sometimes jurisdiction is given to the justice upon the oath of the party aggrieved, and in other cases the complaint or information must be on oath, and in others, perhaps, it may be verbal, without oath. In some of the statutes, the process by which the proceedings are to be commenced is not pointed out, and, consequently, the manner of service is not provided for, and the subsequent proceedings will be found by the acting justice to be as various as the subjects of his jurisdiction. And it would be well that, in each particular case wherein he may be called to act, he should make himself familiar with the statutes relative thereto.

It has been held that it is not necessary that the complaint or information should be in writing, unless required by statute; but when so required, it is imperative. 3 *B. & Cres.*, 649. If the particular statute do not require the information to be on oath, then that form is unnecessary, 3 *B. & Cres.*, 648. 5 *Dowl. & R.*, 558, though the addition of that form will not prejudice. 1 *Saund.*, 262, *note* 1. But when it is required, then the justice cannot legally act unless such oath has been made. 4 *D. & R.*, 734.

It has, however, been held that a conviction ought to be founded upon a preceding complaint or information. *Ld. Raym.*, 509. And, in practice, it is usual to have it in writing, so as to enable the justice correctly to frame his summons or warrant thereon, and to limit the subsequent evidence.

It is obvious that, on every principle of justice, in order that the defendant may be apprised of the supposed offence he is to answer, and the justice what facts he is to try and adjudicate, and that the conviction or acquittal may be admissible in evidence, to prevent a subsequent proceeding for the same cause, there ought to be a formal charge, which is generally termed a complaint or information. *Ld. Raym.*, 500. *Laft.*, 240. And, it is said, the only cases in which a previous information or charge is dispensed with, are those where a justice is authorized to convict on his own view. 2 *Dow. & Ry.*, 600.

Although it is not usual, nor, in general, advisable, yet several offences may be included in the same complaint or information, and stated in several counts or parts thereof. 8 *Term Rep.*, 284.

It has been said, that the safer course is, to describe the offence itself, either affirmatively or negatively, in the very words of the statute; *Ld. Raym.*, 681. 6 *Dow, & Ry.*, 8; but, a variation from the precise words of the statute is not fatal, if the words used are such as bring the case within the plain meaning of the act. 2 *Barn. & Ald.*, 527. 5 *Chit. Rep.*, 563. The complaint or information should, also, state the time when the injury or offence was committed; *Ld. Raym.*, 509. 1 *Russ. on Crimes*, 291; yet the proof need not correspond with the statement of the time, for, even in an indictment for a capital offence, a variance as to time is immaterial. 1 *Salk.*, 378.

It should, also, specify the place, so that it may appear that the injury was committed within the jurisdiction of the justice. *Ld. Raym.*, 1220. 1 *Saund.*, 262, *a*, *note* (*a.*)

The complaint or information must be in the name of the proper complainant, either the party aggrieved, or a common informer, when the latter is allowed to proceed; in the former case, to shew that the complaint or information is by the proper party, and in the latter case, to prevent the shifting of an informer, and to preclude the alleged complainant, when interested, from giving evidence, 1 *Scam. Rep.*, 399. *Ld. Raym.*, 1545, and, in all cases, in order that the defendant may know who is his accuser. 2 *Chit. Gen. Pr.*, 160.

The name of the defendant ought to be correctly stated, if known; for, if process (issued upon a complaint or information) be defective in this particular, that is, if there be a mistake in the name of the person on whom it is to be executed, it is fatal to the process and may be injurious to the officer. 1 *East. P. C.*, 310.

If the name of the party be unknown, the complaint or information may state the best description of him the nature of the case will allow, by which description process may be issued against him. 1 *Chit. Crim. Law*, 39.

The usual course for the complainant, in these proceedings, is to go before one or two justices of the peace, as required by the statute, with witnesses, when necessary, and state the

facts, upon oath when required, upon which the application is founded, and the justice or justices should interrogate the complainant and the witnesses, if any are present, so as to enable him or them to judge of the nature of the complaint and the propriety of issuing process. If he or they consider the facts, thus disclosed, will justify the instituting of proceedings, he then draws up the complaint in legal form, which should then be signed by the complainant and witnesses, if any have been examined, and certified by the justice or justices.

The complainant, either alone or with his witnesses, should state the facts precisely as they occurred and leave the justice or justices to act as he or they think proper, and then, if he or they should mistake the law, or wilfully and maliciously issue a process against the party accused in a case where it ought not to have been issued, then the complainant and witnesses will be wholly free from liability, 3 *Esp. Rep.*, 166. 3 *Term. Rep.*, 185, unless the party aggrieved can show that the complainant maliciously pressed the justice or justices to issue the process. 2 *Chit. Rep.*, 304. 2 *Chit. Gen. Pr.*, 160.

It would seem that there could be no objection to a complaint or information, ready prepared, being presented to the justice or justices, and for him or them to swear the complainant as to the truth thereof, and that it is not essential that it should be drawn in the presence of the justice or justices. Indeed, the justice is not bound to prepare it, nor is he responsible to the complainant for its accuracy, but is merely to receive the complaint or information and swear him to the same, when an oath is required.

When, upon a complaint or information setting forth the facts thus prepared and presented to the justice of the peace, he issues process against the party, he will be protected, although the facts set forth may not be legally sufficient to sustain the prosecution, for, in this he acts in a judicial capacity, and not ministerially. *Breese's Rep.*, 144.

Upon a clear statement of a case, entitling the party to relief, made before one or more justices, and, when there can be no reasonable ground for doubting the jurisdiction or propriety of exercising it, the justice or justices ought to issue a summons or warrant when required.

2. *Of the summons and warrant.*

1. *Of the summons.* When the offence is between party and party, and not of an aggravated nature, and the supposed offender is not likely to abscond, a summons is recommended as the preferable process to procure his attendance, and this seems necessary where there is no oath of the offence having been committed. 1 *Chit. Crim. Pl.*, 32. It seems that, in general, a summons may be granted without the oath of the complaining

party; but, in cases where it is required by the statute, an oath is absolutely necessary. 1 *Chit. Crim. Pl.*, 32.

In all legal proceedings the person complained of ought to have notice of the charge laid against him, and to have an opportunity of being heard in his own defence; consequently, where a person is accused before one or more justices, he ought to be summoned to appear, or brought before him or them by warrant. 4 *Burn's Justice*, 263.

In the case of Holliday *v.* Swails, it was held by Ch. Justice Wilson that, in proceedings under the "Act regulating inclosures," the defendant was entitled to notice of the prosecution against him; that it would be a violation of one of the first principles of justice and of judicial proceedings to try and decide upon the rights of an individual, either civilly or criminally, without notice, and, consequently, without affording him an opportunity of defending himself. 1 *Scam. Rep.*, 516. 4 *Bl. Com.*, 282.

In summary convictions, the party ought to be heard, and, for that purpose, ought to be summoned in fact; and if the justice proceed against a person without summoning him, it would be a misdemeanor in him for which an information would lie. 3 *Burn's Justice*, 26. 1 *Saund.*, 262, *c.*

The summons should state the charge substantially as in the information, in order that the defendant may know what he has to answer, and may prepare his defence accordingly. It is, however, the safer course to copy the whole charge as in the complaint or information. And when a particular form of summons is prescribed by the statute, it must be observed. 2 *Chit. Gen. Pr.*, 175. *Cowp.*, 30.

The summons must name a time and place of appearance, and usually, with analogy to other proceedings, should fix a certain hour of the day; 4 *Burn's Justice*, 264; but yet the party must, if the justice or justices be not ready to proceed to the hearing at the appointed hour, wait during all reasonable hours of the same day. 1 *Douglass' Rep.*, 198.

The time appointed must always allow sufficient opportunity between the service of the summons and the time of appearance, to enable the party to prepare for his defence. The precise time will, generally, depend on distance and the other circumstances of each particular case. The defendant should be allowed not only ample time to obtain legal advice and assistance, but, also, to collect his evidence; and even the convenience of witnesses should be considered, and, therefore, in general, several days should intervene between the time of summoning the defendant and the hearing. 2 *Chit. Gen. Pr.*, 176. It has been held, where the summons was returnable on the same day, that it was extremely unreasonable, as the party's attendance might be impossible, or he might not be able to collect his witnesses on so short a warning. 1 *Str.*, 261. 1 *East.*, 446.

If the summons be dated of a day prior to that when the information was laid, and the party do not appear, any subsequent proceedings would be void. *Ld. Raym.*, 1546. So if it be to appear on an impossible day, as on Tuesday, the 17th day of April, when the 17th day of April fell an Friday, no proceedings could be had thereon, unless the party appear and defend. 1 *Salk.*, 181. 6 *Dowl. & Ry.*, 84.

It is a general rule, however, in these cases, as well as in proceedings in other courts, that appearing and entering into a defence cures not only any defect or informality in the process, but, also, the want thereof. 1 *Saund.*, 262, *c*, *note* (1.)

2. *Of the warrant.* Justices of the peace may grant their warrant in all cases where they have jurisdiction over the offence, in order to compel the person accused to appear before them; for it would be absurd to give them power to examine an offender, unless they had, also, power to compel him to attend and submit to such examination. And this extends, undoubtedly, as well to all such offences as they have power to hear and determine and to punish by statute, as to felonies and breaches of the peace. 4 *Bl. Com.*, 290.

And Mr. Hawkins says that it seems clear that, whenever a statute gives to any one justice of the peace jurisdiction over any offence, or a power to require any person to do a certain thing ordained by such statute, it impliedly gives a power to every such justice to make out a warrant to bring before him any person accused of such offence, or compellable to do any thing ordained by such statute; for it cannot but be intended that a statute giving a person jurisdiction over an offence, doth mean, also, to give him the power, incident to to all courts, of compelling the party to come before him. 2 *Hawk.*, 84.

But, in cases where the people are not a party, and no corporeal punishment is appointed, it seems that a summons is the more proper process; 4 *Burn's Justice*, 389; unless a warrant is directed by the statute.

In all cases, before issuing a warrant for the apprehension of the party accused, it is fitting that the justice take the complaint and information of the party requiring the warrant upon oath, whether expressly required by the statute or not.

It will be observed that, by some of the statutes, an oath is required before a warrant can be issued; and, at common law, before a man can be legally deprived of his liberty, it is a rule that there must have been oath of his having committed an offence, otherwise only a summons should issue. 2 *Term Rep.*, 325. 2 *Barn.*, 34, 77, 101.

It is safe, but perhaps not necessary, in the body of a warrant, to show the place where it was made; yet it seems necessary to set forth the county in the margin, at least, if it be not set forth in the body. 2 *Hawk.*, 85.

It must run in the name of the people of the state of Illinois,

and be directed to the sheriff or any constable of the county, or to any indifferent person by name, who is no officer, for the justice may authorize any one to be his officer whom he pleases; yet it is most advisable to direct it to any constable of the county. *Breese's Rep.*, 144. *Dall. Justice*, 577.

By sec. 51 of "An act concerning justices of the peace and constables," it is enacted that "Any justice of the peace may appoint a suitable person to act as constable in a criminal or other case, where there is a probability that a person charged with any indictable offence will escape, or that goods and chattels will be removed, before application can be made to a qualified constable; and the person so appointed, shall act as constable in that particular case, and no other; and any temporary appointment so made as aforesaid, shall be made by a written endorsement, under the seal of the justice, deputing, on the back of the process, which the person receiving the same shall be deputed to execute." *Gale's Stat.*, 412.

This statute specifies but two cases in which a justice of the peace is authorized to appoint a constable *pro tem.* The one is to execute criminal process where the accused is likely to escape, and the other is to execute civil process where goods and chattels are about to be removed before an application can be made to a qualified constable. 1 *Scam. Rep.*, 488.

It is said that, if a statute direct that a justice shall grant a warrant, and doth not say to whom it shall be directed, by consequence of law, it must be directed to the constable, and it cannot be directed to the sheriff, unless such power is given in the act. *Ld. Raym.*, 1193. And the warrant ought to contain the special cause for which it is issued. *Ante*, 31.

It ought to mention the name of the party to be arrested, and must not be left with blanks to be filled up afterwards. 2 *Hale*, 114. But, if the name of the party be unknown, he may be described by his age, stature, complexion, color of his hair, or the like. 1 *Hale*, 577.

By the common law, in case of a felony or breach of the peace, if the warrant be to bring the party before the justice who issued it, the officer is bound to bring him before the same justice. Yet, it has been said that, even in this case, the officer may take the party before another justice, especially if nearer. 1 *Chit. Crim. Law*, 60.

There seems, however, to be a propriety, in cases of summary proceedings under the statutes, that the officer should take the defendant before the justice who issued the warrant. The complaint or information upon which the warrant issues remains with him, and he may have issued subpœnas for witnesses, and the case may be in readiness for a hearing before him at the time of the arrest.

The warrant should set forth the day and year wherein it is made. 4 *Burn's Justice*, 665.

It should be under the hand and seal of the justice. 2 *Hawk.*,

85. Yet, it is said it would be sufficient under the hand of the justice without a seal, unless the statute expressly required it. 1 *Chit. Crim. Law*, 38.

3. *Of the service.*

It seems to be clear that the summons must be served a reasonable time before that appointed for the hearing.

It appears to have been considered a sufficient service to deliver a copy of the summons to the defendant, or to leave a copy at his residence; and, upon proof of the latter, it will be presumed that he actually received it in due time. 1 *Chit. Crim. Law*, 33. But, as a party upon a conviction may incur a penalty and even imprisonment, no such presumption is allowed; and, unless the particular statute authorizes a service by leaving the summons at the defendant's residence, it must be proved, on the hearing, that he actually received the summons in due time to enable him to attend. 2 *Chit. Gen. Pr.*, 177.

In the case of The King *v.* Venables, the court were unanimously of opinion that the party ought to be heard, and, for that purpose, ought to be summoned in fact; and that, if the justices proceeded against a person without summoning him, it would be a misdemeanor in them for which an information would lie. *Ld. Raym.*, 1506. And it appears to be settled, that personal service of the summons is necessary, unless where it is expressly dispensed with by statute. 10 *Mod.*, 345. 6 *Dow. & Ry.*, 84.

When a warrant is delivered to a constable to execute, it is his duty to proceed forthwith to arrest the defendant and bring him before the justice who issued it.

But, in many cases, as for common assaults, it may not be inconsistent with an officer's duty to give notice to the party accused of the time when he must go before the justice. 1 *Chit. Crim. Law*, 47. If, however, the party is unknown, or there is reason to apprehend that he will not attend, it would be the safest course for the officer to arrest and take him before the justice, as, otherwise, it might be deemed a neglect of duty if the party should fail to appear.

4. *Of the appearance.*

At the appointed hour, where the proceedings are by summons, the complainant or informer with his witnesses, and the party charged with his witnesses, are to attend before the justice or justices, and wait a reasonable time until he be ready. 1 *Douglass' Rep.*, 198.

If, at the appointed time and place, the defendant do not appear, then the justice or justices, before proceeding *ex parte*,

should be well satisfied that there has been a regular and personal service upon the defendant a reasonable time before the appointed hour. 1 *Scam. Rep.*, 516. But, if the justice or justices be satisfied that there was a sufficient service, and that the defendant wilfully neglects to appear, he may then proceed *ex parte*, taking care to observe all regularity in the proceedings. *Str.*, 261. 5 *Dow. & Ry.*, 489.

When a defendant appears at the time mentioned in the summons, or when he is brought before the justice or justices upon a warrant, he has a right to have the complaint deliberately read to him, when the statute requires it to be in writing, or where it has been reduced to writing, and, if not, then at least the substance of the charge must be stated; 2 *Term Rep.*, 23; for he has a right to demand the nature and cause of the accusation against him.

The defendant should then be asked if he has any thing to say in answer to the charge; and the answer which the defendant makes is usually called his plea. 2 *Term Rep.*, 22.

If the defendant appear and confess the charge, without qualification, he thereby dispenses with the necessity for the complainant's adducing any evidence. This is considered as equivalent to the strongest proof, and sufficient even in cases where a particular statute may require the oath of one or more credible witnesses. And it has been held, that proof of a confession made to another person, and not before the justice, if proved by such person to the satisfaction of the justice, in the presence of the defendant, will be sufficient to convict. 1 *Saund.* 262, *c.*

But a confession will extend no farther than the facts charged in the complaint or information; therefore, if the offence be not brought within the statute, the defendant's confession will not make a conviction grounded thereupon good, for a substantial defect in the complaint or information is not thereby aided. 1 *Burr*, 605.

When the defendant pleads to the charge, the justice or justices should ask the defendant if he can produce any evidence to answer the several matters stated in the charge, complaint, or information, and whether he is ready to proceed to trial.

The usual plea, in summary proceedings, is the general issue, "not guilty."

It is presumed that, under a general denial of the matters charged against him, the defendant may give any special matter in evidence. 1 *Chit. Crim. Law*, 474.

5. *Of securing the attendance of witnesses.*

Justices of the peace having power given to them by some of the statutes to hear, try, and determine the matters committed to their jurisdiction, as an incident to that power, may

issue their summons and require the attendance of witnesses; were it not so, the very object and intention of these statutes would be rendered nugatory, and nearly all the legislation relative to summary proceedings, would be fruitless. When a statute gives jurisdiction to justices of the peace, in any particular case, to hear, try, and determine, it is not intended that they are to proceed, in an arbitrary way, without the testimony of witnesses, and to determine as fear, affection, or caprice may dictate. It must be understood that these cases are to be tried and determined accordiag to the known and established rules of law, by the oath of witnesses; and that, for this purpose, the justices have power to issue their summonses or subpœnas and to require their attendance before them to give evidence.

And any person against whom any such proceedings may be instituted, is to have process to compel the attendance of witnesses in his favor. *Const., sec.* 9, *Art. VIII.*

6. *Of the adjournment.*

If the party charged appears, and shows to the justice or justices that there is an adequate excuse for his not being ready to proceed to investigate the charge, he or they should exercise a liberal discretion, and not, prejudicially, press immediate proceedings, and he or they should adjourn the hearing or trial to some future day. 1 *East.*, 637. 8 *Wend., Rep.*, 47. Where a summons is served upon a defendant at so late a day that he is not able to procure his evidence or the attendance of his witnesses at the time set for the hearing, the justice or justices should grant an adjournment. 1 *East.*, 637.

If the defendant be served too late, he should attend before the justice, if possible, and state his objection to the time, and demand an adjournment to another day, and the justice will be bound to grant it. *Str.*, 261.

If the defendant should not appear, and the justice is satisfied that the summons was not served in time, he should, of his own accord, adjourn the hearing and issue a fresh summons reciting the former.

Where the defendant is brought before the justice on a warrant, he should adjourn the hearing to the earliest day when the defendant can be prepared with his evidence and witnesses to make his defence, as he must remain in custody until the hearing.

In cases of assaults, batteries, and affrays, however, it is provided by statute that justices of the peace may take recognizances for the appearance of the accused before the justice taking the same, or before some other justice of the county, on the day appointed by the justice for the trial of the offender. *Gale's Stat.*, 239.

7. *Of the hearing and trial.*

When the complainant and defendant are prepared with their witnesses, the justice or justices having jurisdiction then proceed to the examination of the cause; and if any particular manner of trial is pointed out by the statute, it must be strictly observed. Cases of summary proceedings, by some of the statutes, are tried and determined before one or two justices of the peace without a jury, and, by others, the defendant is entitled to be tried by a jury. Where a trial by jury is dispensed with, the justice or justices must proceed according to the course of the common law in trials by jury, and consider himself only as constituted in the place both of judge and jury, directed and influenced by the special authority given by statute.

This is the only method of trial known to the *civil* law, in which the judge is left to form, in his own breast, his sentence upon the credit of the witnesses examined; but it is rarely used by the *common* law, which prefers the trial by jury before it, in almost every instance. 3 *Bl. Com.*, 336. And it is more congenial with the spirit of our institutions, that, in these cases of summary proceedings, where the defendant may be subjected to a fine or penalty, and even to imprisonment, he shall be entitled to a trial by jury.

Some of the statutes have expressly provided for this method of trial before one or more justices of the peace.

When the officer returns the venire with a panel of jurors annexed, the jurors are to be called, and if they answer to their names, they are then to be sworn, unless challenged by the party; and if, by reason of challenges or the default of jurors, a sufficient number are not in attendance, a *tales* may be awarded, as in civil cases. 3 *Bl. Com.*, 364. This is usually done by ordering the constable to summon from among the persons present in the court the required number to complete the panel, to be joined with the other jurors to try the cause. 3 *Bl. Com.*, 365.

When the jury are empannelled and sworn, the prosecutor or counsel briefly informs them of the nature of the case, and the points in issue, and the evidence intended to be produced, when the witnesses on the part of the prosecution are sworn and examined. 3 *Bl. Com.*, 366.

The defendant, or his counsel, then opens the adverse case, and supports it by evidence. 4 *Bl. Com.*, 355.

When the evidence is closed, it is usually summed up by the parties or their counsel, to the jury. And, in the discharge of this duty, counsel are privileged and protected in commenting fairly and fully on the facts of the case and the law arising thereupon.

After the case is finally submitted to the jury, if they cannot agree upon their verdict, they retire under the charge of a

constable, sworn thus: "You do swear that you will keep this jury in some private and convenient place, without meat or drink, except water; that you will not suffer any person to speak to them, neither will you speak to them yourself, but to ask them whether they have agreed upon the verdict." 4 *Burn's Justice*, 209. The constable should be scrupulously careful not to divulge, in any manner, the state of the deliberations of the jury while under his charge.

When the jury have come to a unanimous determination with respect to their verdict, they return into court, and are then called by name and asked if they have agreed. If they answer that they have, they then, by their foreman, deliver in their verdict to the justice, who enters it in his minutes. The justice then says to the jury, "Listen to your verdict as it is entered: you say you find (repeating the verdict,) and so say you all?"

If either party demand that the jury be polled, the justice should call them over and ask them separately, "Is this your verdict?" If any one disagrees, it is no verdict, and they may be sent out again.

After a verdict has been received and they have been discharged, they cannot vary from it, but it shall stand as it was received and entered by the justice. 2 *Burn's Justice*, 717. 7 *Johns. Rep.*, 33.

Where several are charged with an offence in the same complaint or information, yet, as the charge is distinct against each, the jury may, on the evidence, acquit some of them and find others guilty. Even where they are all charged with doing the same offence, some of them may be convicted and others acquitted. 1 *Chit. Crim. Law*, 640.

8. *Of the conviction and judgment.*

In cases of summary proceedings, it is customary for justices to take minutes of their proceedings, without attending to the precise form of them at the time of their entry or when judgment is pronounced, to serve as memoranda to draw up a more formal statement of them afterwards, should it become necessary. 1 *East.*, 186.

When the issue shall have been determined by the justice or justices, or by the jury empannelled to try the same, and the finding of the justice or justices, or the verdict of the jury, has been entered, it then becomes the duty of the justice or justices to pronounce judgment. 2 *Str.*, 858. 2 *Burr*, 1163. *Paley on Conv.*, 39.

Although there may be no decision or rule of law limiting the time within which a cause tried before one or two justices of the peace without a jury, shall be determined and judgment pronounced; yet it seems that they must proceed with all convenient despatch. 3 *Bl. Com.*, 110. If the cause is tried

by a jury, there can seldom be a necessity for adjourning to another day to give judgment.

In cases where two justices of the peace are authorized to hear and determine, they must be present together to try the cause, and to confer as to the judgment to be given, and to concur and join in it. *Ante*, 4. 1 *Bos. & Pul.*, 492. 7 *Cowen's Rep.*, 526.

If the decision of the cause should be postponed, the complainant and the defendant should have reasonable notice of the time and place when and where the decision will be made, so that they may be present.

And, in every case where the statute requires the defendant to be brought before the justice, it would be proper and, perhaps, requisite that the final decision should be made as soon as the evidence is closed and the case is submitted. It would seem to be an unwarrantable exercise of power to continue the defendant in custody for an indefinite period of time, for this purpose, to suit the convenience of the justice.

When the defendant has been tried before one or two justices, with or without a jury, and found not to be guilty of the charge set forth in the complaint or information, he is then forever quit and discharged of the accusation. But, if he is found guilty, he is then said to be convicted of the offence whereof he stands charged. 4 *Bl. Com.*, 361. 2 *Stark. Ev.*, 426, *and notes*.

It is said that conviction is, either when a man appeareth and confesseth, or is found guilty by the inquest. And the law implies a conviction before punishment, though not mentioned in a statute. Judgment amounts to a conviction, though it doth not follow that every one who is convicted is adjudged. *Jac. Law Dic.*, *title Convict*.

When any corporeal punishment is to be inflicted on the defendant, it is absolutely necessary that he should be personally before the court at the time judgment is pronounced. 1 *Chit. Crim. Law*, 695. 2 *Burn's Justice*, 592.

In proceedings under the vagrant act, the defendant may release himself by giving to the justices a bond, &c., and, on default, he is to be hired out. In this case, it is essential that the defendant should have an opportunity to comply with one of the alternatives offered to him, by being present and informed of the determination of the justices.

But, where a pecuniary penalty only can be awarded, judgment may be given in the absence of the defendant. 1 *Chit. Crim. Law*, 695, 721. *Str.*, 44.

When proceedings are instituted under the statute against a person for an assault, assault and battery, or affray, it would seem that, if he should absent himself during the trial and neglect to attend before the justice when the proofs are closed and the cause is submitted for his determination, when tried before him

without a jury, or when tried before the justice and a jury, if he neglects to attend upon the bringing in of a verdict, it is apprehended that it would be the duty of the justice to proceed and give judgment; for, in these cases, an execution is to be issued to collect the fine and costs out of the personal property of the defendant, if any can be found, before he can be committed to jail. *Gale's Stat.*, 415.

Where there are several defendants, a joint award of one fine against them all is erroneous; for it ought to be several against each defendant; for otherwise, one who hath paid his proportionable part might be continued in prison till the others have also paid theirs, which would be in effect to punish him for the offence of another. 2 *Hawk.*, 446.

There must be a record of the whole proceedings, wherein the justice must set forth the particular manner and circumstances, so as, if he shall be called to account for the same by a superior court, it may appear that he hath conformed to the law, and not exceeded the bounds prescribed to his jurisdiction. 1 *Burn's Justice*, 409.

In actions brought against justices of the peace, they are obliged to show the regularity of their convictions. *Str.*, 701. It should appear on the face of the proceedings, not only that the party has been convicted of an offence within the jurisdiction of the justice, but also that the proceedings against him were regular. 12 *East.*, 67—82. 7 *Term Rep.*, 275. *Cowp.*, 642. 5 *Wend. Rep.*, 281. And it seems that proof of the conviction, where it recites the previous proceedings and shows them to be regular, would be deemed sufficient, at least *prima facie* evidence of the facts recited. 7 *Term Rep.*, 631. 10 *Mod.*, 345. And that, where no summary form is given by a particular statute, if the conviction did not show that the proceedings were regular, as if it did not show that the defendant was summoned or was present, the defect would be fatal and could not, as it seems, be supplied by extrinsic evidence, 6 *Term Rep.*, 375. 8 *Term Rep.*, 542, though it has been held that in some cases affidavits may be heard. Upon this ground convictions have frequently been quashed. 1 *Salk.*, 181; see also 2 *Stark. Ev.*, 427, *and notes*. Yet in Brucklesbank *v.* Smith, 2 *Burr*, 656, all the proceedings were regularly proved in evidence.

Parol evidence, however, would not be admissible to prove the proceedings to support a conviction, for it is not the highest or best evidence. 7 *East*, 146. The material parts are reduced to writing and should be produced. It has been ruled by Mr. Justice Caton, in the ninth judicial circuit, that parol proof, even of the justice of the peace before whom the proceedings were had, cannot be received to explain irregularities appearing upon the face of the proceedings.

In the case of Boomer *v.* Lane, 10 *Wend. Rep.*, 525, it was held that the proceedings in a cause before a justice may be proved by him by the production and verification of his docket, but

he cannot be permitted to give parol evidence of what transpired before him.

The following observations on the form of a record of conviction are principally applicable in those cases in which no directions are given by the statute authorizing this mode of proceeding in the particular instance.

A conviction, in the sense in which the term is here used, is a record of all the proceedings, so that the superior court may judge of their regularity; and when it proceeds on the information of some person and not on the justice's own knowledge, it recites the information and all the subsequent proceedings, usually in the past tense, because, unless by consent, or in some particular cases, it must have been preferred some time before the conviction. 1 *Saund.*, 262. Yet it has been held that the whole record should be in the present tense. 1 *Term Rep.*, 320. *Ld. Raym.*, 1376. It seems, however, that the acts of the party may be in the past tense; but the acts of the court must be in the present tense. 1 *Mod.*, 81. 2 *Saund.*, 493.

It should show that the information was exhibited within the county and jurisdiction of the justice of the peace who issued the process. *Ld. Raym.*, 1220. 13 *East*, 139.

The time when the offence was committed must be stated, so that it may appear that the prosecution was commenced in due time, especially if required by statute to be brought within a certain time. 7 *East*, 146. But if the year necessarily appear by reference to some other part of the conviction, it is sufficient. 7 *East*, 389. It has been seen, however, that the offence need not be proved to have been committed on the precise day laid in the information, although it must be proved to have been within the time limited for the prosecution. *Ante*, 171. 1 *Salk.*, 378.

The particular manner in which the offence was committed must be set forth and described in the manner directed by the act creating it an offence, that it may appear to come within its provisions. *Ld. Raym.*, 1368. *Str.*, 497, 686. In all cases the subject matter of the prosecution should be clearly and distinctly described, so that it may appear to be within, the jurisdiction of the justice. *Cowp.*, 640. 2 *Bl. Rep.*, 1146. 1 *East*, 637. When there is a defect of jurisdiction in this respect, the whole proceedings would be void and no appeal would be necessary. 8 *Term Rep.*, 178.

Regularly the conviction ought to show the kind of process by which the defendant is brought into court and the manner of his appearance, in order to show that jurisdiction of the person was duly obtained. 19 *Johns. Rep.*, 39.

It is a fundamental rule in all cases, that the party should have notice of the proceedings against him before he is convicted; and, unless the law in the particular case requires that he should be brought before the justice by warrant, he should be summoned in fact. 1 *Scam. Rep.*, 515. 4 *Bl. Com.*, 282. But

it is said that the summons need not be set forth in the conviction where the defendant appears, for the defendant's appearance will in this case, as in other cases of process, cure not only all defects and informalities in the summons, but also the want of a summons. 1 *Saund.* 262 *c*, *note* (1.) *Str.*, 261.

It should appear that the evidence was given in the presence of the defendant. 6 *Term. Rep.*, 75. Yet it has been held that, if it appear in the conviction that the evidence was given the same day that the defendant appeared and pleaded, the court will presume that it was given in his presence. 1 *Saund.*, 263, *note* (1.) This, however, seems to be questionable, 1 *East*, 648, unless the proceedings appear to have been continuous. 8 *Term Rep.*, 284. 4 *Barn. & Ald.*, 616.

A conviction not stating the offence to have been proved on oath, is bad. 2 *Barn. & Cres.*, 600. And so it would be if the adjudication exceed the cause of complaint. 3 *Barn. & Cres.*, 857.

Although a statute should direct a conviction to be upon the oath of one or more credible witnesses, without adding, or by the confession of the offender, yet a conviction upon his confession before the justice has been held to be sufficient. *Str.*, 546.

Where the defendant confesses the charge, it seems to be sufficient only to state in the conviction the information, the defendant's appearance, the confession, and adjudication. But a confession will extend no farther than to the facts charged in the information; therefore, if the offence be not brought by the information within the statute upon which the offence is founded, the defendant's confession will not make the conviction good. 1 *Burr*, 605.

According to the practice in England, it is said that it is necessary that the testimony of the witnesses should be set forth particularly in the conviction, that the superior court may judge whether the justice has convicted on proper evidence. 5 *Dowl. & Ry.*, 489. 2 *Burr*, 1165. 8 *Term Rep.*, 220.

Upon removing proceedings in cases of summary convictions before justices of the peace by writ of *certiorari*, we have no statute requiring justices of the peace to return the evidence.

The *certiorari* to remove a conviction is in effect a writ of error, for the facts or merits upon which the proceedings took place cannot be discussed in the court above, but merely the form and sufficiency of the proceedings as they appear upon their face. 5 *Term R.*, 358. 8 *Term Rep.*, 542. 6 *Wend. Rep.*, 564.

A *certiorari* brings up the record only, and not the testimony, unless required by statute. 8 *Cowen's Rep.*, 13. Its office is merely to remove the record, of which the testimony is not a part.

An inferior tribunal, however, is bound to return so much of the facts of the case as will enable the superior court to de-

termine whether such tribunal had jurisdiction of the subject matter adjudicated upon. 6 *Wend. Rep.*, 564.

It is apprehended that the circuit courts of this state have the power to review the proceedings of all inferior tribunals, to pass upon their jurisdiction, and to review all legal decisions made by them, but not their determinations upon questions of fact, which are conclusive unless an appeal or power of review is given by statute. *Ld. Raym.*, 469, 580. 2 *Scam. Rep.*, 273.

There must be a judgment in the conviction stating not only that the defendant was guilty, but, likewise, adjudging the fine or forfeiture to which the party is subjected. It has always been considered essential that there should appear that a judgment was pronounced, and that the same in substance should be precise and certain. *Paley on Conv.*, 206. And even in cases where a forfeiture or punishment would be the legal and imperative result, yet that the justice must adjudicate that the same has been incurred, although he had no discretion or power to prevent that result. *Str.*, 858. 2 *Burr*, 1163. 8 *Mod.*, 175. 7 *Term Rep.*, 238.

If a statute require a conviction in a penalty, and then add that, on default of payment, the party shall be subject to certain corporeal punishment or imprisonment, it suffices to adjudge the payment of a prescribed penalty without noticing the contingent punishment, which must be the subject of a subsequent application to the justice; 3 *Maul. & Sewl.*, 331; and if the offender do not pay the penalty, the justice may commit him afterwards if he refuse to pay. 1 *Saund.*, 263, *b*, *(l.)*

Where there are several offences charged and set forth in the complaint or information, if the justice convict of all, his conviction should be in the plural, "of the offences aforesaid," or he may adjudicate upon each separately. If there be several offences charged, a conviction, stating that the defendant was guilty of the *offence* aforesaid, would, it has been considered, be void for the uncertainty which of the several offences was referred to. 3 *Term Rep.*, 249. When the justice intends to convict of one of several offences charged, he must be particular in showing which, and should in terms acquit the defendant and dismiss the complaint as to the residue.

Where the statute upon which the conviction is founded distributes the penalty in certain proportions, it is sufficient to state generally in the adjudication that the penalty shall be distributed as the statute directs. 1 *Salk.*, 383. But where the statute leaves it discretionary in the justice to distribute the penalty in such proportion as he shall direct, the distribution forms part of the judgment, and must therefore appear in the conviction itself. 2 *Term Rep.*, 96.

Where a statute authorizes a justice of the peace before whom any proceedings may be had to award the costs of such proceedings against any person who may be convicted, he

must ascertain and determine the amount for which such person is liable, and insert the same in the conviction.

In making up judgment against the defendant for costs, the justice should only include the costs which have been made by the prosecutor, such as the fees for the process, service thereof, fees of witnesses summoned on the part of the prosecution, &c.

If the defendant makes any costs, he will be personally liable to the officers whose services he may require, in the same manner as for other services.

It has been held that, where a statute gives power to a justice of the peace, on a summary conviction, to award the reasonable charges of taking a distress, he must ascertain the amount in the conviction, and an adjudication that the defendant shall pay the *reasonable charges* of the levy is bad. 1 *East*, 189. 5 *East*, 339.

It is provided by statute that, "In all criminal prosecutions before a justice of the peace, where the party accused shall be found not guilty, and it shall appear to the justice before whom such case shall be tried, that there was no reasonable ground for said prosecution, and that it was maliciously entered, that in such case, the justice of the peace is hereby authorized to give judgment against the complainant for the costs of said suit, and issue execution thereon." *Gale's Stat.*, 422.

The date is essential to show the time when the conviction was made, and yet it has been held that if the date were impossible or incongruous, it may be rejected as surplusage, and will not vitiate if the correct time can be ascertained. 2 *East*, 197. But the time of the actual subscription and sealing is not material, nor need it correspond with that on the face of the conviction. 1 *East*, 185.

The convicting justice or justices must sign and seal the conviction, and this imports that he or they have fully considered and determined upon the same as the result of their judgment. The signing and sealing were always, at common law, considered essential to the validity of a conviction. *Str.*, 794. 3 *Barn & Cres.*, 649.

If a conviction be legal on the face of it, then as long as it stands unquashed, it will protect the justice or justices for any thing done under it. 16 *East*, 21. 7 *Term Rep.*, 623. So that, when a warrant of commitment, or distress, or other execution thereon, is not in itself defective, then, unless the conviction has been quashed, it constitutes a complete defence and protection to the justice for anything done upon it, however irregular or unjust the conviction may have been as regards the merits. 3 *Barn. & Ald.*, 684. 8 *Johns. Rep.*, 50. *Ante*, 9.

But if a court of limited jurisdiction issues process which is illegal and not merely erroneous, as where the subject matter

upon which the process is issued is not within its jurisdiction; or if a court, whether of limited jurisdiction or not, undertakes to hold cognizance of a cause, without having gained jurisdiction of the person, by having him before them in the manner required by law, the proceedings are void; and, in the case of a limited or special jurisdiction, the magistrate attempting to enforce a proceeding founded on any judgment, sentence, or conviction, in such a case, becomes a trespasser. 19 *Johns. Rep.*, 39. 2 *Stark. Ev.*, 428—433.

These convictions being lengthy and tedious, are seldom drawn up in form, till some occasion calls them forth; as when a writ of *certiorari* issues from the superior court requiring the justice to certify the record and proceedings into that court; or when it becomes necessary that it should be read in evidence for the protection of the justice or officer executing process founded upon it.

It is no objection to the conviction that it has been drawn up in a regular form since the time of conviction, or even since the commencement of an action. 16 *East.*, 21. And it is by no means unusual to draw up the convictions in point of form after the penalty has been levied under the judgment. Nor is there any legal objection to this method, provided the facts will warrant them in stating what they do; 1 *East*, 186. 12 *East*, 32; unless the process, subsequent to the time of conviction, should betray or disclose that it was not truly founded on a sufficient conviction. 1 *Dowl. & Ry.*, 214.

It is, however, important that the justice should take minutes of the proceedings and judgment, so that, if called upon at any subsequent time, he may be enabled to draw up a conviction reciting all the material facts and circumstances attending the case.

These minutes, however, it is not presumed, could be used in evidence in any case. 5 *Wend. Rep.*, 281.

9. *Of enforcing the conviction and judgment.*

1. By warrant of distress and sale.
2. By warrant of commitment.

1. *Of the warrant of distress and sale.*

When a fine has been imposed upon an offender in any of the superior courts of record, it appears that a *levari facias* might issue out of the court which imposed the fine, as well as out of the exchequer; for that the imposition of the fine constituted a debt of record due to the king, like any other judgment. *Skin. Rep.*, 12. 2 *Show.* 173. 1 *Ch. Rep.*, 401—443.

And where a defendant, in an indictment for a misdemeanor, has received judgment of fine and imprisonment, it has been held that a *levari facias* may issue immediately to take goods

in execution of the fine. 1 *Chit. Crim. Law*, 811. 8 *Wend. Rep.*, 215.

But the county courts and court-baron not being courts of record, but the courts of private persons, it is said, cannot impose a fine or imprison. *Jac. Law Dict., title Court.* Yet in some cases they seem to have exercised the power of assessing amercements, for which, however, no distress could be taken and sold unless by prescription. 11 *Coke Rep.*, 45. 12 *Mod.*, 330. It has been held that as a distress for an amercement in a court-baron cannot be sold, that a distress infinite may go, 1 *Bulst.*, 52, in which case the distress would be retained until satisfaction was made. 2 *Bac. Ab.*, 206.

The great court-leet being an inferior court of record, may distrain for all fines and amercements. *Jac. Law Dic., title Amercement.* 2 *Bac. Ab.*, 201-2.

Of common right a distress is incident to every fine and amercement in the sheriff's tourn or court-leet, whether the same belong to the king or to the subject, if the offence for which they were imposed be of common right incident to the jurisdiction of such courts. 2 *Bac. Ab.*, 354.

The usual method of punishment in the court-leet is by fine and amercement, the former assessed by the steward and the latter by the jury; for both of which the lord may have an action of debt, or take a distress. *Jac. Law Dic., title Court-leet.*

A distress taken for an offence presented in the leet, may of common right be sold, because it is a court of record. 12 *Mod.*, 330.

It seems to be agreed, that where any such court is in the king's hands, the goods distrained for such fines and amercements may lawfully be sold, after they have been kept a reasonable time, as the space of sixteen days. 2 *Bac. Ab.*, 355.

For an amercement imposed at a court-leet, the lord may sell the distress, partly because, being the king's court of record, its process partakes of the royal prerogative; but principally because it is in the nature of an execution to levy a legal debt. 3 *Bl. Com.*, 14.

These courts having for a long time been declining, the business which was formerly done in them has, for the most part, gradually devolved upon the quarter sessions, an inferior court of record held by two or more justices of the peace, possessing all the power and authority exercised by those courts.

And in England, by the statutes, jurisdiction has been conferred upon a single justice to receive information and to hear and determine in many cases, for small offences. In these summary proceedings, he acts as a judge of record; and, when any offender is convicted, the justice pronounces judgment and makes up his conviction in writing, upon which he usually issues his warrant, either to apprehend the offender, in case corporeal punishment is to be inflicted on him, or else to levy

the penalty incurred, by distress and sale of his goods. 4 *Bl. Com.*, 283.

All the courts in this state, as well the inferior as the superior courts, are the people's courts, and the tenure of the office of the judges and justices holding them is defined and prescribed by the constitution and laws; and a court of a private person is unknown to our laws.

It is apprehended that justices of the peace in this state, who are elected by the people and hold their office by virtue of the sovereign power, are invested with authority equal to the inferior courts of record in England.

And even in a civil suit before a justice, which terminates in a final judgment on the merits, the parties are precluded from again investigating the same matters, unless on appeal. 1 *Scam. R.*, 152.

In proceedings, then, before justices of the peace under any special statute, which results in the conviction of the defendant and judgment for a fine or penalty, the fine or penalty becomes a debt of record, like any other judgment; and a distress, taken upon warrant or execution for the collection thereof, cannot be replevied for the purpose of again testing the validity of the judgment, when the matter was properly within the jurisdiction of the justice, but may be sold to make the amount of the fine or penalty imposed by the justice.

Some of the statutes authorizing summary proceedings before justices of the peace expressly authorize the issuing of a distress warrant, or execution to collect the amount of any judgment which may be rendered, or costs awarded, by a sale of property.

Where power is given to levy a penalty by distress by any statute, without specifying that the distress may be sold, a power to sell is, notwithstanding, necessarily implied. 6 *Mod.*, 83.

2. *Of the warrant of commitment.*

To every fine imprisonment is incident; 8 *Coke R.*, 59; and, when an offender is fined, the usual judgment is that he be imprisoned until the fine is paid. 1 *Vent.*, 116.

But, at the present day, all that is usual to insert in the judgment in relation to the execution is, the award of the proper process to carry into effect the sentence of the court. 8 *Wend. R.*, 215.

In the superior courts, it seems that a *levari facias*, or a *capias pro fine*, may issue to collect the fine, and that the public prosecutor may cause either of these writs to be first issued. 1 *Salk. R.*, 56. 2 *Show.*, 173.

Justices of the peace in England, by virtue of their commission and the statutes, were very early authorized to enquire of all trespasses or transgressions, to hear and try all such

offences after the offenders are come in, and to determine thereof, by giving judgment and inflicting punishment upon the offenders, according to the laws and statutes, viz., by fine, imprisonment, or otherwise, according to the law; but not to award any recompense to the party wronged otherwise than by persuasion. *Dalt. Justice*, 21. 3 *Burn's Justice*, 19.

And it is said that punishment of all offenders is implied in the word *determine*. 3 *Burn's Justice*, 19.

It seems that justices of the peace, upon their own view of some offences, may imprison the offender against divers penal laws, and that such offender ought immediately to be committed to jail, till he pays the fine. *Dalt. Justice*, 584. 4 *Burn's Justice*, 104.

But imprisonment to be inflicted by the justice of the peace, almost in all cases, is but to retain the party until he hath made fine for the contempt or offence; and, therefore, if he shall offer to pay his fine, or shall find sureties by recognizance to pay it, he ought to be delivered presently. *Dalt. Justice*, 586. If the fine is tendered, there ought to be no imprisonment. *Jac. Law Dic.*, *title Fine for Offences*.

It seems, however, that the adjudication need not be that the party shall be committed if he do not pay the penalty; the justice may commit him afterwards, if he refuse to pay. 3 *Maul.* & *Sel.*, 331.

By our statutes, there are a number of offences committed to justices of the peace to hear and determine, and of which the offenders may be convicted, either upon their own confession or upon trial, in all which cases the justices may convene the offenders before them by summons or warrant, and, after trial and conviction, may imprison or otherwise punish the offenders, according as they are limited by the said statutes. These statutes will be found at large under their appropriate heads.

CHAPTER II.

MASTER AND APPRENTICE.

1. Binding of apprentices.
2. Differences between master and apprentice.
3. Attempts of master to remove apprentice out of the state.

1. *Binding of apprentices.*

By the 1st section of the act of this state entitled "*An act respecting apprentices*," it is provided "That if any male person within the age of twenty-one years, or female within the age of eighteen years, now is, or shall hereafter be bound by an indenture of his or her own free will and accord, and by and with the consent of his or her father, or in case of the death of his or her father, with the consent of his or her mother or guardian, to be expressed in such indenture, and signified by the signature and seal of such parent or guardian affixed to such indenture, and not otherwise, to serve as a clerk, apprentice or servant in any art or mystery, service, trade, employment, manual occupation or labor, until he or she arrive, if male, to the age of twenty-one, if female, to the age of eighteen years, as the case may be, or for a shorter term, then the said clerk, apprentice or servant so bound as aforesaid, shall serve accordingly. *Provided*, That in all cases of illegitimate children, the mother, or in case of her death, the guardian shall be considered the proper person to give the consent required in this section, and, *provided further*, that it shall be lawful for any male infant under the age of twenty-one years, or any female under the age of eighteen years, and who shall have no parent or guardian living in this state, or whose parents shall be dead, by and with the approbation of the judge of probate, or of any two justices of the peace of the county where such infant shall reside, to bind himself or herself as a clerk, apprentice or servant as aforesaid, which approbation shall be endorsed on the indenture, and every such indenture shall be valid and binding; and one copy thereof shall be filed in the office of the judge of probate for safe keeping." *Gale's Stat.*, 52.

"Sec. 11. The executor or executors who are, or shall be by the last will and testament of a father, directed to bring up his child or children to some trade or calling, shall have power to bind such child or children, by indenture, in like manner as the father if living might have done, or shall raise such child or children according to such directions."

"Sec. 3. It shall be lawful for any two overseers of the poor, in any county of this state, by and with the consent of the judge of probate, or for any two justices of the peace, in any county of this state, to bind out any poor child, who is or shall be chargeable to the county, or shall beg for alms, or shall be unable by reason of infancy or inability, to take care of and support himself or herself, or whose parents are or shall be chargeable to the county, or shall beg for alms, or the child of any poor and needy family, when the father is an habitual drunkard, or otherwise unable or unwilling to support his family, or if there be no father, where the mother is of bad

character, or suffers her children to grow up in habits of idleness without any visible means of obtaining an honest livelihood, to be apprentices as aforesaid, according to their degree and ability, until such child, if a male, shall arrive at the age of twenty-one years; if a female to the age of eighteen years, and the indentures or articles of agreement for binding any such infant shall be as effectual to all intents and purposes, as if such infant had bound himself or herself. One copy of such indentures, or articles of agreement, shall be filed in the office of the judge of probate for safe keeping. And it shall be the duty of the justices of the peace or judge of probate, to see that the terms of the said indentures and contracts be fulfilled, and that such child be not ill used.

"Sec. 4. In all indentures and contracts hereafter made, for the binding or putting out of any child as a clerk, apprentice or servant, there shall always be inserted among other covenants, a clause to the following effect: 'That the master or mistress, to whom such child shall be bound as aforesaid, shall cause such child to be taught to read and write, and the ground rules of arithmetic; and shall also give unto such apprentice, a new bible, and two new suits of clothes, suitable to his or her condition, at the expiration of his or her term of service:' *Provided, however,* That when such apprentice is a negro or mulatto child, it shall not be necessary to insert in said indentures, that such negro or mulatto shall be taught to write, or the knowledge of arithmetic.

"Sec. 5. The age of any infant who shall be bound to serve as a clerk, apprentice or servant, according to the preceding sections, shall be inserted in his or her indentures.

"Sec. 6. All indentures, covenants, promises, and bargains, for having, taking or keeping any clerk, apprentice or servant, hereafter to be made or taken, otherwise than is limited and prescribed by this act, shall be utterly void in law, as against such clerk, apprentice or servant."

2. *Differences between master and apprentice.*

By the 7th section of the act, it is provided that "The judge of probate, or any two justices of the peace, shall at all times receive the complaints of apprentices, who reside within the jurisdiction of such judge or justices, against their masters or mistresses, alleging undeserved, or immoderate correction, unwholesome food, insufficient allowance of food, raiment or lodging, want of sufficient care or physic in sickness, want of instruction in their trade or profession, or the violation of any of the agreements or covenants in indentures of apprenticeship contained, or that he or she is in danger of being removed out of the jurisdiction of this state; and shall cause such masters or mistresses to be summoned before them, and shall on the return of the summons, whether such master or mistress ap-

pear or not, hear and determine such cases, in a summary way, and make such order thereon, as in the judgment of the said judge of probate, or two justices of the peace, will relieve the party injured in future; and shall have authority, if said judge or two justices think proper, to discharge such apprentice of and from his or her apprenticeship or service. And in case any money or other thing, shall have been paid, given, or contracted or agreed for by either party in relation to the said apprenticeship or service, shall make such order concerning the same, as the said judge or justices of the peace shall deem just and reasonable. And if the said apprentice so discharged shall have been bound originally by a judge of probate or two justices of the peace, it shall be the duty of the court granting the discharge, again to bind him or her, if said court shall judge proper.

"Sec. 8. The said judge of probate, or any two justices of the peace shall, on the complaint of masters or mistresses, issue a warrant against any apprentice for desertion, without good cause, or for any misdemeanor, miscarriage or ill behavior, and may punish such apprentice or servant according to the nature and aggravation of his or her offence, by imprisonment not exceeding ten days; and in addition to the above punishment, where the offence shall be desertion without good cause, the court may order the said apprentice or servant guilty thereof, to make restitution by the payment of a sum not exceeding eight dollars for each and every month he or she may be so absent, to be collected as other debts, after such servant or apprentice shall become of full age. The awarding of costs on proceedings under this and the preceding sections, shall be in the discretion of the court. An appeal to the circuit court from any decisions made under this or the preceding sections, shall be allowed to either party, upon the party appealing, entering into a bond, with good and sufficient security, in the penalty of one hundred dollars, conditioned to prosecute such appeal to effect, and to abide by and perform the decision of the circuit court in the premises: which court shall hear and decide such appeal, upon the same principles as the said judge of probate or justices ought to have heard and decided the original complaint. The decision of the circuit court shall be final and conclusive in the premises, and shall not be subject to appeal or writ of error. The bond above mentioned, shall be entered into before the clerk of the circuit court, who shall thereupon proceed in said appeal as is directed by law, in cases of appeal from the decisions of justices of the peace in other cases."

In enacting the 7th section of this act, the important duty of legislators, to fix with certainty and precision the species of punishment for offences, seems to have been lost sight of; and, in conferring upon the judge of probate, or the two justices of the peace, the power to "hear and determine such cases in a

summary way, and make such order thereon as, in his or their judgment, will relieve the party injured in future," the means to accomplish so desirable an end seem to have been left without bound or limit, other than his or their humor or discretion. Such, however, cannot have been the intention.

By the English statute of the 5th of Elizabeth, chapter 4, on the subject of apprentices, it was provided that, "If any such master shall misuse or evil intreat his apprentice, or the said apprentice shall have any just cause to complain, or the apprentice do not his duty to his master, then the said master or apprentice being grieved, and having cause to complain, shall repair unto one justice of the county, or to the mayor or other head officer of the city, town-corporate, or market-town, or other place where the master dwelleth; who shall by his wisdom and discretion, take such order and direction between the master and his apprentice as the equity of the cause shall require: and if for want of good conformity in the master, the said justice (or head officer) cannot compound and agree the matter, he shall take bond of the said master to appear at the next sessions; and on his appearance, and hearing of the matter there, if it be thought meet to discharge the said apprentice, then the justices, or four of them at the least, whereof one of them to be of the quorum, or the said mayor or other head officer, with the consent of three other of his brethren, or men of best reputation in such city, town-corporate, or market-town, shall have power, in writing under their hands and seals, to pronounce and declare that they have discharged the said apprentice from his apprenticehood, and the cause thereof."

Under the English act, it will be seen that the justice, mayor, or other head officer, acted only as mediator between the parties in these cases of complaints by apprentices against their masters for ill treatment. He took such order and direction between them as he thought the equity of the case required; and, if the master would not conform to it, he bound him over to appear at the next sessions; and power was given to the sessions to discharge the apprentice.

It was held in England, under this act of Elizabeth, that, in case the master had received money with the apprentice, the sessions could order the money to be refunded; that it was a power incident to their power of discharge: although this was a matter of doubt.

Exception was taken to an order of discharge, that the sessions had ordered money to be returned. But, by the court, the order is good. And Holt, Ch. J., said he never doubted of that matter, for it is a power consequential upon their jurisdiction to discharge. 1 *Salk.*, 68.

But, in the case of the King *v.* Vandeleer, the justices at the sessions ordered an apprentice to be discharged, and that the master, having received £5 with him, should refund £3 as a further provision for him. This was moved to be quashed, because

the statute which gives the justices power to discharge gives them no authority to order any money to be returned. By the court: It is very hard that, if the master misuseth his apprentice, the next day after he is bound, he should pay back nothing if he is discharged; it will be an encouragement to masters to treat their apprentices ill; but the statute being silent, the order must be quashed. *Str.*, 69.

Nevertheless, this doctrine of refunding seemeth now to be established, as founded on great reason, though not expressly mentioned in the act; for the justices being authorized to discharge according to their discretions, when the end of the apprenticeship cannot be attained with one person, it is but justice the master should return part of the money he has received with his apprentice, to place him out with a new master. 4 *Bac. Ab.*, 566. 1 *Burn's Justice*, 78.

And it has been held, that an order upon the master to return money is good, though it is not averred that he had any with the apprentice; for the order being to return money is a necessary proof of the receipt of it; and the justices in their orders are not obliged to set forth all the steps they take in their proceedings, there being nothing in the act which makes it necessary; and there is a known and established distinction between orders and convictions. 4 *Bac. Ab.*, 567.

It appears to have been usual, upon the binding of apprentices in England, to make a payment of money on the part of the apprentice, to the master, for the benefit of learning the trade. This, however, was sometimes some other thing and not money.

In the time of George II. in England, jurisdiction was conferred upon two justices of the peace, in certain cases, to hear and determine these complaints of apprentices against their masters.

By the 20th George II., chapter 19, it was provided that "On complaint unto two justices, by any parish apprentice, or other apprentice, upon whose binding out no larger a sum than £5 was paid, concerning any misusage, refusal of necessary provision, cruelty, or other ill treatment, they may summon the master or mistress to appear before them at a reasonable time to be named in such summons; and on proof, upon oath, of the truth of the said complaint, (whether the master or mistress be present or not, if service of the summons be also upon oath proved,) the said justices may discharge the apprentice by warrant or certificate under their hands and seals."

Under these English statutes, (from which our statute has been taken,) the power of the sessions in one case, and of the two justices in the other, was limited to discharging the apprentice, and, as an incident thereto, of ordering money paid to be refunded.

It will be seen that the duty and power of the justice, mayor, or head officer to endeavor to compound and agree the difference between the master and apprentice, was expressed in general and indefinite language. He was to "take such order and direction between the parties as the equity of the case should, in his wisdom and discretion, require." So in our act the words are general and indefinite, "the justices are to make such order as in their judgment will relieve the party injured in future."

It can hardly be supposed that the legislature intended to confer any other or higher power upon these two justices than the court of sessions had, viz., the power to discharge the apprentice; and to settle the question about refunding money; and, also, to provide for a case where something besides money was given in relation to the apprenticeship. And that this undefined, discretionary power of "relieving the party injured in future," is rather a power of advising than enforcing. For it is said to be "one of the glories of the English law, that the species, though not always the quantity or degree, of punishment is ascertained for every offence: and that it is not left in the breast of any judge, nor even of a jury to alter that judgment which the law has beforehand ordained for every subject alike, without respect of persons." 4 *Bl. Com.*, 377.

It cannot be that the legislature intended to give justices full power to take such measures as in their humor or discretion would prevent an apprentice, who had been misused by his master, from being again misused; and that these measures were to be as various as the different notions or temperaments of the justices; that, if one court of two justices should conclude that the *lex talionis* would produce the desired effect, and, in case of a complaint by an apprentice against his master for "an insufficient allowance of food," that confining the master and giving him a like insufficient allowance would teach him, by actual experience, the inconvenience thereof, and thus be the means of relieving the apprentice in future; that, if another should come to the conclusion that corporeal punishment would be the more effectual method; another, that a heavy fine would better promote the end; that these would be included in their general undefined powers of determining the case in a summary way, and of making such order thereon as in their judgment would relieve the party injured in future.

If such, indeed, was the intention of the legislature; if justices were thus to be left at sea without a compass or chart, is there not cause to apprehend that there may be a violation of the 14th Section of Art. VIII. of the constitution of this state, which declares that all penalties shall be proportioned to the nature of the offence; as well as of the 8th Sec. of Art. IV.,

(upon the subject of the appointment of justices of the peace,) which requires that their powers and duties shall be regulated and defined by law?

There has, as yet, been no adjudication by the supreme court in relation to the extent of the powers of justices under these general words. And, until there is, it might, perhaps, be safer to consider them as only conferring a power to compound and agree the difficulty, as in the English act. For instance, after hearing the evidence, the justice might conclude to discharge the apprentice unless the master would give security, by bond or otherwise, to clothe or feed the apprentice better in future, or as the case might be. This security might be ordered to be given. And in case of a "want of good conformity in the master," the justice then could exercise the power of the English sessions, and discharge the apprentice. There would seem, however, to be no way of compelling the giving security, except by its being understood that the discharge was to be the consequence of refusal.

3. *Attempts of master to remove apprentice out of the state.*

By the 12th section of the act, it is provided that "It shall not be lawful for any master or mistress, to remove any clerk, apprentice or servant bound to him or her as aforesaid out of this state; and if at any time it shall appear to any judge, or justice of the peace, upon the oath of any competent person, that any master or mistress is about to remove, or cause to be removed, any such clerk, apprentice or servant out of this state, it shall be lawful for such judge or justice, to issue his warrant, and to cause such master or mistress to be brought before him, and if upon examination, it appear that such apprentice, clerk or servant, is in danger of being removed without the jurisdiction of this state, the judge or justice may require the master or mistress to enter into recognizance, with sufficient security, in the sum of one thousand dollars, conditioned that such apprentice, clerk or servant, shall not be removed without the jurisdiction of this state, and that the said master or mistress will appear with the apprentice, clerk or servant before the circuit court, at the next term thereof, and abide the decision of the court therein; which recognizance shall be returned to the circuit court, and the said court shall proceed therein, in a summary manner, and may discharge or continue the recognizance, or may require a new recognizance, and otherwise proceed according to law and justice. But if the master or mistress, when brought before any judge or justice, according to the provisions of this section, will not enter into a recognizance as aforesaid, if required so to do, it shall be lawful for such judge or justice to commit the custody of such apprentice, clerk or servant to some other proper person, who will enter into recognizance as aforesaid."

Form of an indenture entered into by a person within the age of twenty-one years, by and with the consent of his father, &c.

This indenture, made the day of in the year of our Lord one thousand eight hundred and between A. B., of in the county of and state of Illinois, of the age of (*seventeen*) years, on the day of last, the son of C. D. of the same place, of the one part, and E. F., of in the county of and state aforesaid, of the other part, *Witnesseth*, that the said A. B., by and with the consent of the said C. D., his *father*, signified by the signature and seal of the said C. D. affixed to this indenture, and of his, the said A. B.'s, own free will and accord, hath placed and bound himself apprentice to the said E. F., blacksmith, which trade the said E. F. now follows, and with the said E. F. to dwell, continue, and serve, from the day of the date hereof until the said A. B. shall have attained the age of twenty-one years; during all which time the said apprentice shall well and faithfully serve his said master, keep his secrets, and obey his lawful commands. He shall not depart or absent himself from the service of his said master without his said master's leave.

[And the said E. F. acknowledges that he has received with the said A. B., from the said C. D., his father, the sum of dollars, (or "a horse of the value of dollars,") as a compensation for his instruction as hereinafter mentioned.]

And the said E. F. covenants and agrees to and with the said A. B. that he will instruct the said A. B., or cause him to be taught and instructed after the best way and manner he can, in the said trade of a blacksmith, which he now uses and follows, with all things belonging thereto, and that he shall and will find and allow to the said apprentice suitable meat, drink, washing, lodging, and apparel, and all other things necessary, fit, and convenient for said apprentice, during the said term.

And that he will cause the said A. B. to be taught to read and write, and the ground rules of arithmetic, and that he will give unto the said A. B. a new bible, and two new suits of clothes, suitable to his condition, at the expiration of his term of service.

And the said E. F. farther covenants and agrees with the said A. B. that if the said A. B. shall well and faithfully serve as said apprentice, he will pay him for the second year of his term the sum of ten dollars, and for the third year the sum of twenty dollars, and for the fourth and last year the sum of thirty dollars.

[These covenants may be varied to express the intention of the parties.]

In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

Executed and delivered in the presence of } A. B. [L. S.] C. D. [L. S.] E. F. [L. S.]

Duplicates of this indenture should be made, each party taking one.

Form of indenture entered into by an infant having no parents or guardian living in the state, or whose parents are dead.

This indenture, made the day of 18 between A. B., of the age of twelve years, on the day of last, who has no parents or guardian living in this state, (or "whose parents are dead,") of the county of *La Salle*, in the state of Illinois, of the one part, and C. D. of the same place, of the other part, *Witnesseth*, that the said A. B., by and with the approbation of *Sylvanus Crook* and *William Richardson*, Esquires, two of the justices of the peace in and for the county of *La Salle*, endorsed upon this indenture, and by the free will and consent of the said A.B., hath placed and bound himself to the said C. D., of *South Ottawa*, in the said county, farmer, with the said C. D. to continue and labor, from the date hereof, until he, the said A. B., shall have attained the age of twenty-one years, which will be on the day of in the year one thousand eight hundred and during all which time the said A. B. shall well and faithfully serve and obey the said C. D., in all his lawful business and commands. and the said C. D. covenants and agrees to and with the said A. B., that he will teach and instruct him, or cause him to be taught and instructed, in the employment, business, and art of farming, which the said C. D. now follows, with all things belonging thereto, and that he will find and allow to him, the said A. B., meat, drink, washing, lodging, and suitable apparel, and all other necessaries fit and convenient for him during the term aforesaid; and that the said C. D. will cause the said A. B. to be taught to read and write, and the ground rules of arithmetic, and will also give to the said A. B. a new bible, and two new suits of clothes, suitable to his condition, at the expiration of his term of service.

In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

Signed, sealed, and delivered in the presence of *Sylvanus Crook*, *William Richardson*. } A. B. [L. S.] C. D. [L. S.]

Duplicates of this indenture should be executed by the parties, and one copy thereof filed in the office of the probate justice of the peace, for safe keeping.

Form of approbation of two justices of the peace to be endorsed.

State of Illinois, }
La Salle county, } ss. It appearing to us, *Sylvanus Crook* and *William Richardson*, Esquires, two of the justices of the peace in and for the said county, that the within named A. B. hath no parents or guardian living in this state, (or "that the parents of the said A. B. are dead, and that he hath no guardian living in this state,") we do hereby approve of the binding the said A. B. to the within C. D., according to the form and effect of the within indenture.

Given under our hands, this day of 18

Sylvanus Crook,
William Richardson.

Indenture by two justices of the peace, under sec. 3.

This indenture, made the day of in the year of our Lord one thousand eight hundred and between *Sylvanus Crook* and *William Richardson*, Esquires, two justices of the peace in and for the county of *La Salle*, in the state of Illinois, of the one part, and *John Davis*, of the said county, shoemaker, of the other part, *Witnesseth*, that the said justices of the peace, in pursuance of the statute in such case made and provided, have put, placed, and bound, and by these presents do put, place, and bind A. B., of the age of (*fifteen*) years on the day of last (the child of a poor and needy family, and the father of said child being an habitual drunkard, and unable to support said family,) to be an apprentice with him, the said *John Davis*, and as an apprentice, to dwell with him, the said *John Davis*, from the date of these presents until the said A. B. shall come to the age of twenty-one years: during all which time, the said A. B. shall well and faithfully serve the said *John Davis*, his master, keep his secrets, and obey his lawful commands. He shall not at any time depart or absent himself from his said master's service, without leave.

And the said master, in consideration of the before mentioned premises, shall and will teach and instruct, or cause to be well and sufficiently taught and instructed, the said A. B. in the craft, trade, and mystery of a shoemaker, which he, the said E. F., now useth with all things thereto belonging, and that he shall and will find and allow to the said apprentice suitable meat, drink, washing, lodging and apparel, and all other things necessary, fit, and convenient for said apprentice, during said term.

And the said *John Davis* shall also cause the said A. B. to be taught to read and write, and the ground rules of arithmetic; and shall give unto the said A. B. a new bible, and two

new suits of clothes suitable to his condition, at the expiration of his term of service.

In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

Executed and delivered in the presence of } *Sylvanus Crook*, [L. S.]
William Richardson, [L. S.]
John Davis. [L. S.]

Complaint to two justices, under sec. 7.

State of Illinois, }
La Salle county, } ss. The complaint of A. B., of said county and state, exhibited on this day of in the year of our Lord one thousand, &c., before us, *Sylvanus Crook* and *Willim Richardson*, Esquires, two of the justices of the peace in and for the said county, who saith that he is an apprentice, bound by indenture to E. F. of *South Ottawa precinct*, in said county, hatter; and that upon his binding out the said E. F. received with him the sum of *twenty-five* dollars for his instruction; (or if no money was paid, then say, "did not receive any sum of money with him for his instruction;") and that the said E. F. hath misused and ill treated him, for that the said E. F., at *South Ottawa*, in the county aforesaid, on the day of 18 immoderately corrected and beat him, the said A. B., with a large cart-whip so as to cause him to be lame and sick for three days, and unable to perform his ordinary duties, (if for any other cause, here set it forth,) he therefore prays that the said E. F. may be summoned to answer this complaint. A. B.

Exhibited to, and received the day and year first above written by, us, *Sylvanus Crook*, *William Richardson*.

Summons to the master on said complaint.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county:

Whereas, complaint has been made unto *Sylvanus Crook* and *William Richardson*, Esquires, two of the justices of the peace in and for the said county, by A. B. of said county, that he is an apprentice to E. F. of said county, hatter; and that upon the binding out (as in the complaint.)

These are, therefore, to require you to summon the said E. F. to appear before the said justices at the *office* of *Sylvanus Crook*, Esquire, in *South Ottawa*, in said county, on the day of instant, (or next,) at o'clock in the noon, to answer unto the said complaint, and to be further dealt with according to law. Hereof fail not.

Witness, the said justices, at *South Ottawa*, in said county, this day of in the year of our Lord one thousand eight hundred and

Sylvanus Crook, [L. S.]
William Richardson. [L. S.]

Subpœna for witnesses.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of said county:

We command you that you summon G. H., I. J., and K. L., personally to be and appear before *Sylvanus Crook* and *William Richardson*, Esquires, two of the justices of the peace in and for said county, at the *office* of *Sylvanus Crook*, Esquire, in *South Ottawa*, in said county, on the day of next, at o'clock in the noon, to testify the truth and give evidence on the part of the people of the state of Illinois, (or on the part of E. F.,) in the case of a complaint of A. B., an apprentice, against E. F., his master, for *immoderate correction*. And this you will in no wise omit. Witness the said justices, at *South Ottawa*, in said county, this day of in the year of our Lord one thousand eight hundred and

Sylvanus Crook, [L. S.]
William Richardson. [L. S.]

Order of discharge and to refund, &c.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of at complaint was made before us, *Sylvanus Crook* and *William Richardson*, Esquires, two of the justices of the peace in and for the county of *La Salle* and state of Illinois, by A. B. of said county, that he was an apprentice to E. F. of said county, hatter; and that upon his binding out, the said E. F. received with him the sum of *twenty-five* dollars for his instruction, (or, if no money was paid, then say, "did not receive any sum of money with him for his instruction,") and that the said E. F. has misused and ill-treated him, for that the said E. F., at *South Ottawa*, in the county aforesaid, on the day of 18 immoderately corrected and beat him, the said A. B., with a large cart-whip, so as to cause him to be lame and sick for three days and unable to perform his ordinary duties, (if for any other cause, here set it forth.)

And whereas, the said E. F. hath appeared before us in pursuance of our summons for that purpose, and upon hearing the proofs and allegations of both of the said parties, and upon*

* If the master do not appear on the trial, instead of this recital, say, "And

consideration had thereof, it manifestly appears to us that the said E. F. is guilty of the premises so charged against him.

We, therefore, by these presents, do discharge the said A. B. from his obligation of service to the said E. F., anything in any indenture of apprenticeship made between them or otherwise to the contrary notwithstanding.

And whereas, it appears to us, upon hearing said proofs and allegations, that the said master contracted to give to the said A. B., upon the expiration of his term of service, a new bible and two new suits of clothes, suitable to the condition of the said A. B., and that the said master also contracted to pay to the said apprentice, for his service, the sum of ten dollars for the second year, &c., (or "that the said master received with said apprentice, the sum of dollars, or a horse worth dollars.")

We, therefore, deeming it just and reasonable so to do, order and decree that the said E. F. be discharged from his said contracts and agreements, and that, in lieu thereof, he pay to the said A. B. the sum of dollars, (or "that the said E. F. pay and restore to the said apprentice, A. B., the said sum of dollars, which he had with him on his binding;" or "that he pay to the said A. B. the sum of dollars for the horse which he had with him at his binding," as the determination may be.)

Given under our hands and seals, the day of one thousand eight hundred and

Sylvanus Crook, [L. S.]
William Richardson. [L. S.]

Form of complaint by master against apprentice, on sec. 8.

State of Illinois, }
La Salle county, } ss. The complaint of A. B. of in said county, blacksmith, exhibited before *Sylvanus Crook* and *William Richardson*, Esquires, two of the justices of the peace in and for the said county, on this day of 18 under oath, who said that C. D., apprentice by indenture to him, the said A. B., has in the service of his apprenticeship, been guilty of several misdemeanors, miscarriages, and ill-behavior towards him, the said A. B., and particularly, that the said C. D., at in the said county, on the day of 18 (set out particularly the facts in relation to the desertion, misdemeanor, miscarriage, or ill-behavior:) He therefore prays that the said C. D. may be

whereas, the said E. F. has been duly summoned to appear before us to answer the above complaint, but has not appeared pursuant to said summons; and, upon examination into the said complaint, and upon hearing the proofs and allegations of the said A. B., and upon due consideration."

required to come before the said justice to answer this complaint. A. B.

Exhibited to and received by us, the day and year first above written.
Sylvanus Crook,
William Richardson.

Warrant on the above complaint.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county:

Whereas, complaint hath this day been made before *Sylvanus Crook* and *William Richardson*, Esquires, two of the justices of the peace in and for the said county, by A. B., of in the said county, blacksmith, that C. D., an apprentice by indenture to the said A. B. (set out the offence as in complaint.)

These are, therefore, in the name of the people of the state of Illinois, to require you forthwith to apprehend the said C. D. and bring him before the said justice to answer unto the said complaint, and to be dealt with according to law; and you are to give notice to the said A. B. that he appear before the said justices at the same time to make good the said complaint. Given under the hands and seals of the said justices, the day of in the year of our Lord one thousand eight hundred and
Sylvanus Crook, [L. S.]
William Richardson. [L. S.]

Form of Record of conviction.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of in the year, &c., at *South Ottawa*, in the said county, complaint was made before *Sylvanus Crook* and *William Richardson*, Esquires, two of the justices of the peace in and for the said county of *La Salle* and state of Illinois, upon oath, by A. B. of said county, blacksmith, that C. D., apprentice by indenture to the said A. B., (set out the offence as in complaint,) and thereupon, on said day of 18 at said county, we, the said justices of the peace as aforesaid, issued a warrant under our hands and seals, directed to any constable of said county, requiring the said constable, in the name of the people of the state of Illinois, forthwith to apprehend and bring the said C. D. before us to answer unto the said complaint of the said A. B.; and the said C. D. being apprehended and brought before us upon said warrant, and the said A. B., on the day of 18 at said county

both appeared before us, the said justices of the peace as aforesaid. And the said C. D. being informed of the charge in said complaint, he, the said C. D., is asked by us, the said justices of the peace, if he can say anything for himself, why he, the said C. D., should not be convicted of the premises above charged against him in form aforesaid: who pleadeth that he is not guilty of the said charge; and upon hearing the proofs and allegations of both the said parties, the said defendant being present and hearing the same, and upon due consideration had thereof, it manifestly appears to us that the said C. D. is guilty of the premises so charged against him; and, thereupon, the said C. D., on the said day of 18 at said county, is convicted.

We, the said justices of the peace, do, therefore, on this day of 18 at said county of adjudge and determine that the said C. D. be imprisoned in the jail of the said county for the space of *seven days*.

And it also appearing to us that the said C. D. hath remained absent from the service of him, the said A. B., for the space of one month, we do order, adjudge, and determine that the said C. D. pay to the said A. B. the sum of *five* dollars as a restitution thereof. In witness whereof we, the said justices, have hereunto set our hands and seals, at *South Ottawa*, in the county aforesaid, the day of 18

Sylvanus Crook, [L. S.]
William Richardson. [L. S.]

Commitment of apprentice on complaint of master, under sec. 8.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county, and to the keeper of the common jail of the said county:

Whereas, complaint hath been made before *Sylvanus Crook* and *William Richardson*, Esquires, two justices of the peace in and for the said county, upon oath, by A. B., of in said county, blacksmith, that C. D., apprentice by indenture to the said A. B., hath (set out the offence as in complaint.)

And whereas, upon examination thereof, and upon hearing the proofs and allegations of both parties, they having come before us for that purpose, and the said defendant being present during said examination and hearing, and upon due consideration had thereof, it manifestly appears to us that he, the said C. D., apprentice as aforesaid, is guilty of the premises so charged against him as aforesaid:

We do, therefore, hereby command you, the said constable, to take and convey the said C. D. to the jail of said county of at and to deliver him to the said keeper

thereof, together with this warrant. And we do hereby command you, the said keeper of the said jail, to receive the said C. D. into your custody in the said jail, there to remain confined for the space of *seven* days. Given under the hands and seals of the said justices, at *South Ottawa*, in the county aforesaid, the day of 18

Sylvanus Crook, [L. S.]
William Richardson. [L. S.]

Form of oath, under sec. 12.

You do solemnly swear by the ever living God, that you will make true answers to such questions as may be asked you touching the present complaint against E. F. So help you God.

Affirmation, sec. 12.

You do solemnly, sincerely, and truly declare and affirm, that you will make true answers to such questions as may be asked you touching the present complaint against E. F. And this you do under the pains and penalties of perjury.

Form of warrant, under sec. 12.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois, to any constable of said county :

Whereas, C. D., a competent person, hath this day of in the year of our Lord one thousand eight hundred, &c., made complaint, on oath, before *Sylvanus Crook*, Esquire, one of the justices of the peace of said county, that E. F., the master of A. B., an indentured apprentice, is about to remove or cause to be removed, the said A. B. out of this state :

We, therefore, command you forthwith to take the said E. F. and bring him before the said justice, at his office in *South Ottawa*, in said county, to be dealt with according to law. Hereof fail not at your peril. Witness, the said *Sylvanus Crook*, Esquire, at *South Ottawa*, in said county, this day of in the year of our Lord one thousand eight hundred and *Sylvanus Crook*. [L. S.]

Recognizance, under sec. 12.

State of Illinois, }
La Salle county, } ss. Be it remembered, that on this day of in the year of our Lord one thousand eight hundred, &c., E. F., of the county of *La Salle*, and G. H. and I. J., of in the said county, personally come before

me, *Sylvanus Crook*, Esquire, a justice of the peace of the said county, and severally and respectively acknowledge themselves to owe to the people of the state of Illinois, that is to say, the said E. F. the sum of one thousand dollars, and the said G. H. and I. J. the sum of five hundred dollars each, to be levied of their respective goods and chattels, lands and tenements, to the use of the said people, if the said E. F. shall make default in the condition following:

The condition of this recognizance is such that, if the said E. F. shall not remove A. B., an apprentice, (or "clerk," or "servant,") bound to him by indenture, without the jurisdiction of this state, and shall personally appear with said apprentice (or "clerk," or "servant") before the circuit court at the next term thereof to be held in and for the county of *La Salle*, and abide the decision of the court therein, and shall not depart the court without leave, then this recognizance to be void, otherwise to remain in full force.

E. F.
G. H.
I. J.

Taken, subscribed, and acknowledged the day and year first above written, before me, *Sylvanus Crook*.

CHAPTER III.

ARBITRATION.

Arbitration is where the parties submit the matters in difference between them to a tribunal created by themselves and composed of one or more persons, called arbitrators. They are so called because their power is arbitrary; for, if they observe the submission and keep within due bounds, their decisions are final and conclusive, and there is no appeal from them.

The terms arbitration and reference are often used as synonymous, and yet, in strictness, there is a difference between them, an arbitration being where the parties, in the first instance, select arbitrators as a tribunal, and a reference being where a suit has been commenced before another tribunal, and referred by that to referees, who report their proceedings to it. The subject of referring suits, by a justice of the peace, will hereafter be examined. Arbitration, as thus distinguished from reference, is the subject now to be considered; and, though it is one with which justices of the peace, as such,

do not have a great deal to do, yet, as they are perhaps more frequently called upon to act as arbitrators than other persons, a brief view of the law relating thereto may not be amiss.

By the common law as adopted in this state, arbitrators had no power to compel the attendance of witnesses before them, or of administering oaths to them; and from this cause their awards must, in some instances, have been unjust and unsatisfactory. 3 *Bl. Com.*, 17, *note* 9. And so the law remained in England until the time of William IV.

Submissions to arbitrations were entered into by a rule of the court, at the common law, when a cause was depending; and the statute of 9 and 10 Willian III., c. 15, was intended to give the same efficacy to awards where there was no suit or action pending. 2 *Burr*, 701. The first three sections of the act of this state contain, with some modifications, the same provisions as the act of William. The fifth section provides for compelling the attendance of witnesses and for administering oaths to them.

Arbitrations are either under the statute or at common law. Arbitrations under the statute differ from those at common law in this respect: in the former, the award being returned into court, judgment may be rendered, and an execution issued for the amount awarded to be paid, or, if the award be for the performance of some act and not for the payment of money, obedience may be enforced by attachment; but in the latter, the amount awarded can only be collected by bringing suit on the award, or the performance of the act awarded to be done can only be enforced in a court of chancery. In the former the submission must be in writing, and in the latter, it may be either verbal or in writing; yet it would be better always to have the terms of the submission reduced to writing, in order to prevent dispute about what is to be submitted to the arbitrators. 15 *Wend.*, 97.

The following is the act of our legislature on the subject, except the fourth section, which is in relation to referring cases pending in the circuit court.

"Sec. 1. *Be it enacted by the people of the state of Illinois, represented in general assembly*, That all persons desirous to end any dispute or controversy by arbitration, for which there is no other remedy but by action at law, or suit in equity, may agree that their submission to arbitration shall be made a rule of the circuit court, and may insert such their agreement in the submission, or in the condition of the bond or promise; which agreement, on producing an affidavit of the due execution thereof, and filing it in the court, may be entered of record, and a rule of court shall thereupon be made, that the parties shall submit to, and be finally concluded by such arbitration; or such persons desirous to end any dispute or controversy as aforesaid, may personally appear before the circuit court, and acknowledge that they have mutually agreed to refer all

their matters of difference, or any particular dispute, to the arbitrament of certain persons by them agreed on and named: on their desiring such submission to be made a rule of court, the same may be entered of record, and a rule of court shall be made, that the parties shall submit to and be finally concluded by such arbitration. In either of the above cases, when the award shall be for the payment of money only, the same being returned into, and accepted by the court, judgment shall be rendered thereon for the party in whose favor the award is made, to recover the sum awarded, to be paid to him, together with the costs of arbitration and the costs of court, and execution may issue thereon accordingly. No judgment shall be entered on any such award, unless it shall appear to the court that a copy of the award and notice to appear and shew cause why judgment should not be entered on the same, has been previously served on the party to be charged with the judgment, at least four days before the motion for judgment shall be made: no judgment shall be entered on motion as aforesaid, after one year from the time of making the award.

"Sec. 2. When the award shall be for the performance of any thing other than the payment of money, the same being returned into and accepted by the court as aforesaid, obedience thereto may be enforced in the said court, by attachment, in the same manner, as obedience may be compelled to any other rule of court.

"Sec. 3. Any arbitration, umpirage or award, procured by corruption or undue means, shall be judged void, and may be set aside in law or equity; in equity, by proceedings on original bill, and at law, on motion in the court where submission is made a rule of court, or where any suit or proceedings shall be instituted on the arbitration bond, submission or award. Complaint must be made of such corruption or undue practice, before final judgment upon the said bond, submission or award.

"Sec. 5. The several clerks of the circuit courts and the justices of the peace in their several counties, may issue subpœnas for the attendance of witnesses before arbitrators and referees: if any witness, after being duly summoned, shall fail to attend, the arbitrators or referees may issue an attachment to compel his attendance, and the said witness shall moreover be liable to the party for refusing to attend the same as in trials at law. The arbitrators and referees may administer oaths and affirmations to witnesses; may punish contempts committed in their presence during the hearing of a cause, the same as a court of record; may continue the hearing of a cause from time to time upon good cause shown, and may admit depositions to be read in evidence, the same as in trials at law.

"Sec. 6. Each arbitrator and referee shall before he pro-

ceeds to the duties of his appointment take an oath or affirmation, faithfully and fairly to hear and examine the cause in question, and to make a true and just report or award, (as the case may be,) according to the best of his skill and understanding; which oath or affirmation, any judge or justice of the peace of this state is authorized and required to administer.

"SEC. 7. Each arbitrator and referee shall be allowed for every days attendance to the business of his appointment, one dollar, to be paid in the first instance, by the party in whose favor the award or report shall be made, but to be recovered of the other party with the other costs of suit, if the award or report shall entitle the prevailing party to recover costs. Witnesses shall receive the same fees for attendance at arbitrations and references, as shall be allowed them in the circuit courts. Sheriffs, constables, clerks and justices of the peace, shall be entitled to the same fees for services performed in relation to any arbitration or reference, as shall be allowed by law for the like services in their respective courts."

Care should be taken, in preparing the submission, to state that the *submission* to arbitration, and not the *award*, shall be made a rule of court. The supreme court of this state has decided that, in the latter case, it would be erroneous to enter up a judgment on the award in the circuit court. *Breese's Rep.*, 230. The English statute, on this subject, contains the same phraseology as ours, "that the consent expressed in the bond, or agreement, must make the submission a rule of court;" and, under their statute, it was decided that, though the submission bond stated that the *award* should be made a rule of court, yet it was no objection. 3 *East*, 602. The case of Harrison *v.* Grundy, 2. *Str.*, 1178, where a similar objection prevailed, was cited in this case in East, but Ld. Ellenborough, referring to a later case, Powell *v.* Phillips, *E.* 30, *Geo. III.*, where the bond stated that the *award* should be made a rule of court instead of the *agreement*, and, in which case, it was holden to be no objection, said this was the later and more sensible determination. And to the same point, see 2 *Bos. & P.*, 444. 1 *Ld. Raym.*, 674. 1 *Salk.*, 72. *Beames*, 55. Our supreme court requires a more strict adherence to the language of the act, and the language certainly requires the *submission*, and not the *award*, to be made a rule of court.

If the submission be according to the statute, it may be revoked before it is made a rule of court, but not afterwards. 1 *Cowen's Rep.*, 335. 7 *East*, 608. 3 *Scam. Rep.*, 324. If not according to the statute, then it may be revoked at any time before the award is made, and, if it be without deed, then it may be revoked without deed. 1 *Bac. Abr.*, 204.

If the submission be by deed, it is, of its own nature, countermandable, though made irrevocable by the express words of the deed; for the arbitrators being constituted and put in

the place of the parties, by their consent, to act for them, they can no longer act than they have such consent. But it cannot be countermanded except by deed. 1 *Bac. Abr.*, 204.

If the submission be by two on the one side, and one on the other, one of the two cannot revoke without the consent of the other, for joint acts are considered as the acts of one person; and there can be no revocation without the act of that person that made the submission. 1 *Bac. Abr.*, 205. 12 *Wend.*, 578.

If a single woman submit to arbitration, and afterwards marry, this is a revocation of the submission. 1 *Bac. Abr.*, 205.

In the above cases, however, a revocation would subject the party revoking to an action upon the indenture or submission bond.

In order to make a revocation complete, notice thereof should be given to the opposite party. 1 *Cowen's Rep.*, 335. 1 *Bac. Abr.*, 204.

Reasonable notice of the time and place of the meeting of the arbitrators should be given to the parties, and, also, to all the arbitrators; and the manner in which this is to be done is often provided for by a clause in the submission in relation to it.

After the arbitrators and parties have assembled, the arbitrators should be sworn or affirmed, as required in sec. 6. The language used in this section, as well as that in section 5, appears to refer to arbitrations generally, and not to be confined to those where the submission is in conformity to the statute. If such were not to be the construction, there would be no power to compel the attendance of witnesses, except in a case under the statute. The hearing is to be conducted in a manner similar to that in a trial in court, the arbitrators acting in the capacity of both judge and jury, or, if it be a case of equity jurisdiction, in the capacity of chancellor; and in the trial of the matters in difference, they ought to observe the established rules of law and equity, applicable to proceedings in courts of law and in the chancery courts; for experience shows that the ends of justice are better promoted by an adherence to the rules and principles of law which have been adopted after long discussion and careful examination, than they are by leaving each case to be decided entirely according to the humor or discretion of the persons composing the tribunal.

If no reservation be made in the submission, the parties are presumed to agree that every question, both as to law and fact, necessary for the decision, is to be included in the arbitration. Under a general submission, therefore, the arbitrators have, rightfully, a power to decide on the law and on the fact; and in making their decision they are not confined to common law principles, but may decide according to those of courts of equity. 2 *Story's Equity*, 677.

The award must conform to the submission, and, if an award

be made of a matter different from that which is contained in the submission, it is void; for no act is my own, or binding on me, unless done by me, or by commission from me. 1 *Bac. Abr.*, 213. 16 *Johns. Rep.*, 227. Thus, where the submission required an award under *hand* and it was not *signed*, though under seal, or that it should be under seal and it was only signed; in each of these cases the awards were held void in England. 2 *Chit. Gen. Pr.*, 105.

So if it be not made within the time limited by the submission. *Kyd. on Awards*, 96. 6 *Johns. Rep.*, 13.

So where there was a parol submission to five persons, and four of them agreed to the award and one dissented, it was held that the award was void. 6 *Johns. Rep.*, 39. Where the agreement in the submission, however, is that two of the three arbitrators may make the award, it can be made by the two, if the three are present and hear the case, or if one decline to attend after being duly notified of his appointment, and of the time and place of meeting. 2 *Wend.*, 494.

If the submission be general, of all matters in difference, &c., and the arbitrators, after being notified that there is a matter in dispute about a house and shed, make an award of other matters and say, in their award, that they did not take the house and shed into consideration, the award is void. 5 *Cowen*, 197.

Where the submission is general, the parties should be careful to bring before the arbitrators all their claims; for the award would be a bar to a recovery in a suit for any cause of action that might have been passed upon by the arbitrators, under the powers given them in the submission. 12 *Johns. Rep.*, 311. 2 *Chit. Gen. Pr.*, 106. 3 *Scam. Rep.*, 245.

The award must be final and certain, that is, it must make a final disposition of the matters submitted, and leave nothing for further litigation, and it must clearly define what is to be done. For instance, an award to finish *the house*, without describing what house is meant, would be void for uncertainty.

So, an award that one party pay to the other one eighth of the prize drawn by lottery ticket number 3, 8, 43, after *deducting the amount then already paid*, it not appearing what was the amount paid, would be neither final nor certain, and, consequently, void. 12 *Wend.*, 377.

So, an award that one of the parties shall cause the planks of his mill dam to be taken down, so as to reduce the quantity or head of water therein eleven inches, perpendicular measure, lower than the same was, on the 27th of December, 1839, when the said dam was examined by the said arbitrators herein, which is to be done in twenty days from the date hereof, is void for uncertainty. 3 *Scam. Rep.*, 429.

An award made on Sunday would be void, it being a judicial act, and all judicial acts on Sunday were void at common law. 8 *Cowen's Rep.*, 27. Sunday is stated in all the books to

be not a judicial day. According to the history gived by Ld. Mansfield in the case of Swan *v.* Broome, 3 *Burr*, 1597, courts of justice used anciently to sit on Sunday. They had two reasons for it; first, to be in opposition to the heathens, who were superstitious about the observance of days and times, conceiving some to be unlucky and others to be lucky, and therefore Christians laid aside all observance of days; second, that, by keeping their courts always open, they prevented Christian suitors from resorting to heathen courts. But in the year 517 a canon of the church was made, that causes should not be adjudicated upon the Lord's day, and this canon was ratified in the time of Theodosius. These and other canons were received and adopted in England by the Saxon kings, and were afterwards confirmed by William the Conqueror and Henry II.; and became part of the common law of England. And so judicial acts upon Sunday became void, and thus they have since remained. Other acts, of a ministerial character, are not void unless made so by statute.

Agreement of submission.

This agreement, made the day of in the year of our Lord one thousand eight hundred, &c., between A. B., of &c., and C. D., of &c. Whereas, differences and disputes have arisen and are depending between the said A. B. and C. D., (if it be intended expressly to limit the power to award upon one or more particular matters, they may be specified here and the power afterwards expressly limited to them as recited; but, if the submission is to be general, the agreement should immediately proceed thus:) Now, therefore, the said A. B. and C. D. do, and each of them doth, each for himself, severally and respectively covenant, promise, and agree to and with the other, his heirs, executors, administrators, and assigns, well and truly to stand to, abide by, perform, and keep the award, order, arbitrament, and final determination of E. F., G. H., and I. J., arbitrators, mutually agreed upon by the said parties, of and concerning the premises aforesaid, or anything in anywise relating thereto; and, also, of and concerning all, and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, judgments, executions, quarrels, controversies, trespasses, damages, and demands whatsoever, both at law and in equity, at any time heretofore, up to, and upon the day of the date hereof, had, made, moved, brought, commenced, sued, prosecuted, committed, or depending by or between the said parties, or any of them, and all other matters in difference between them up to the day of the date hereof, inclusive hereof, so as the said award of the said E. F., G. H., and I. J., (or any two of them,) under their

hands, and ready to be delivered to the parties in difference, or such of them as shall desire the same, on or before the day of 18

[It is also agreed by and between the said parties, that this, their submission, shall be made a rule of the circuit court in and for the county of *La Salle*, and state of Illinois, to the end that the parties respectively may be finally concluded by the said arbitration, pursuant to the statute in such case made and provided.]

[It is also agreed that the arbitrators shall have full power to examine the said parties on oath.]

[It is also agreed that each party, days, at least, before the time appointed for the hearing before the said arbitrators, shall produce and deliver to the other a full, true, just, and clear account or statement in writing of all and every item of his claim, or set off, or advance, payment, or deduction, whether liquidated or unliquidated; and that, if default is made by this not being done, the arbitrators shall and may award such costs, or sum of money as stipulated damages in lieu of costs, to be paid by the party guilty of neglect in the premises, as they may think fit.]

[It is also agreed, that the said arbitrators shall, at the request of either of the parties so to do, made in writing at or before the time the arbitrators retire to consider their award, in and by their said award, state and separately adjudicate upon every claim made by, or on behalf of, either party, and state whether they allow or disallow the same.]

[It is also agreed that the said arbitrators shall, at the instance and request of either of said parties, state, in explicit terms, upon the face of the award, the exact evidence and facts, in respect whereof either of the said parties shall think fit to state or raise any legal objection or question, whether upon the admissibility or competency of any evidence or witness, or upon any question of law touching, or in any wise relating to, the interests of either party, respecting which their, the said arbitrators', award is to be, or might or ought to be made, together with the opinion of the said arbitrators thereon, and in so clear and distinct a manner as to enable both, or either of the said parties, to obtain the opinion of the circuit court of the county of *La Salle*, touching such questions or points of law, or the due effect to be given to such evidence, or to the opinion or decision of the said arbitrators, or the result and validity of their award, in whole or in part.]

[It is also agreed that the said arbitrators may, in their discretion, proceed to hear the case *ex parte*, provided the parties have had days notice of the time and place of hearing.]

In witness whereof, the said parties have hereunto set their hands and seals respectively, the day and year aforesaid.

Executed and delivered in the presence of } A. B. [L. S.]
C. D. [L. S.]

Such of the above stipulations in brackets as the parties may desire, can be adopted to suit the case, and the rest rejected.

Duplicates should be executed, each party taking one agreement; or, if but one is executed, it may be left with one of the arbitrators.

If the submission is to be by cross bonds, instead of by agreement, the following form may be used, one bond to be delivered by each party to the other.

Know all men by these presents, that I, A. B., of in the county of and state of Illinois, am held and firmly bound unto C. D., of in the county aforesaid, in the sum of dollars, to be paid to the said C. D., or to his certain attorney, executors, administrators, or assigns, for which payment, well and faithfully to be made, I bind myself, my heirs, executors, and administrators, firmly, by these presents. Sealed with my seal, dated the day of 18

The condition of this obligation is such that, if the above bounden A. B., his heirs, executors, and administrators, on his or their part and behalf, shall and do in all things well and truly stand to, abide by, perform, and keep the award, order, arbitrament, and final determination of E. F., G. H., and I. J., arbitrators, mutually selected by the said A. B. and the said C. D. to arbitrate, award, order, adjudge, and determine of and concerning all, and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, judgments, executions, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time heretofore had, made, moved, brought, commenced, sued, prosecuted, committed, or depending by and between the said parties, so as the said award be made in writing under the hands of the said E. F., G. H., and I. J., (or any two of them,) and ready to be delivered to the said parties in difference, or such of them as shall desire the same, on or before the day of 18 then this obligation to be void, otherwise to remain in full force.

(If the parties wish to make the submission a rule of court, then add, "And it is hereby agreed by and between the said A. B., and the said C. D., that this submission shall be made a rule of the circuit court in and for the county of *La Salle*, to the end that the said parties, respectively, may be finally concluded by the said arbitration and award thereon, pursuant to the statute in such case made and provided.")

In witness whereof, I have hereunto set my hand and seal, the day of 18

A. B. [L. S.]

Sealed and delivered in the presence of O. P.

If it be desired to extend the time of making the award, the

following may be endorsed upon the bond or agreement of submission:

It is hereby, on this day of 18 agreed by and between the within named A. B. and C. D., that the time to which the arbitrators named in the within bond (or agreement) of submission were limited, be extended until the day of and the said arbitrators are hereby empowered to make their award so that it be ready to be delivered to said parties, or such of them as require it, on said day of 18 Witness, our hands and seals, this day of 18

A. B. [L. S.]
C. D. [L. S.]

Notice of revocation.

To G. H.:

Take notice, that I have this day revoked the power and authority of A. B., C. D., and E. F., arbitrators, chosen to settle the matters in controversy between us, by an instrument of revocation, of which the following is a copy, viz.:

Yours, &c.

I. J.

Form of revocation.

To A. B., C. D., and E. F.:

Take notice, that I hereby revoke your power and authority as arbitrators, under the submission made to you by G. H. and myself, by our mutual bonds, (or "indenture,") dated, &c.

In witness whereof, I have hereunto set my hand and seal, this day of in the year of our Lord one thousand eight hundred and I. J. [L. S.]

Form of arbitrators' appointment of meeting.

We appoint Monday, the day of 18 at o'clock, in the noon, at the office of E. F., in *Ottawa*, as the time and place when and where we will proceed to the hearing of the matters submitted to us by A. B. and C. D. (Dated.)

E. F.
G. H. } *Arbitrators.*
I. J.

To A. B. and C. D. and their attorneys.

Form of subpœna to appear before arbitrators.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to H. I., J. K., L. M., and N. O.:

We command and require you, and each of you, personally to be and appear before E. F., G. H., and I. J., arbitrators,

chosen to determine a controversy between A. B. and C. D., at the office of the said E. F., in *Ottawa*, in said county, on the day of 18 at o'clock in the noon, to testify the truth, according to your knowledge, touching the matters depending before the said arbitrators, on the part of the said A. B., (or "C. D.") Hereof fail not at your peril. Given under the hand and seal of *Jabez Fitch*, Esquire, one of the justices of the peace of said county, the day of 18 *Jabez Fitch.* [L. S.]

Form of attachment against a witness.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of said county:

We command you to attach H. I., if he may be found in your county, and bring him before E. F., G. H., and I. J., arbitrators chosen to determine a controversy between A. B. and C. D., at the office of the said E. F., in *Ottawa*, in said county, forthwith, (or "on the day of 18 at o'clock in the noon,") to testify the truth, according to his knowledge, touching the matters depending before the said arbitrators, between the said parties, on the part of the said A. B., (or "C. D.,") and, also, to answer all such matters as shall be objected against him, for that the said H. I., having been duly subpœnaed to attend at the hearing before the said arbitrators, has failed to attend pursuant to the requirement of such subpœna, and have you then and there this precept. Given under the hands and seals of the said arbitrators, the day of 18

E. F. [L. S.]
G. H. [L. S.]
I. J. [L. S.]

Form of oath or affirmation to be administered to the arbitrators.

You, and each of you, do swear in the presence of the ever living God, (or "do solemnly, sincerely, and truly declare and affirm,") that you will faithfully and fairly hear and examine the matters in controversy submitted to you as arbitrators, by and between A. B. of the one part, and C. D. of the other part, and make a true and just award thereof, according to the best of your skill and understanding.

Form of oath or affirmation to be administered to witnesses before arbitrators.

You do swear in the presence of the ever living God, (or "do solemnly, sincerely, and truly declare and affirm,") that the evidence you shall give to the arbitrators, touching

or concerning the matters in difference, submitted for their determination and award, by and between A. B., of the one part, and C. D., of the other part, shall be the truth, the whole truth, and nothing but the truth.

Form of an award.

To all to whom these presents shall come, we, E. F., G. H., and I. J., send Greeting:

Whereas, divers suits, disputes, differences, and controversies have arisen and are depending between A. B. of the one part, and C. D. of the other part, for the ending and determining whereof, the said parties, by their agreement (or "bonds") of submission, bearing date, the day of 18 have reciprocally bound themselves each to the other, to stand to, abide by, perform, and keep the award, order, arbitrament, and final determination of us, the said E. F., G. H., and I. J., so as the said award be made under our hands, and ready to be delivered to the parties in difference, on or before the day of 18 as by the said agreement (or "bonds") and the conditions thereof, reference being had thereto, will appear:

Now, therefore, know ye, that we, the said arbitrators, whose names are hereunto subscribed, taking upon ourselves the burthen of the said award, and having been first duly sworn according to law, faithfully and fairly to hear and examine the matters of difference between the said parties in question, and to make a true and just award thereon, according to the best of our skill and understanding; and having fully examined and duly considered the proofs and allegations of both the said parties, who were duly notified of the time and place at which the said award would be made; do make and publish this our award between the said parties:

First, we do award and order, that all actions, suits, quarrels, and controversies whatsoever, had, moved, arisen, and depending between the said parties in law or equity, for any manner of cause whatever, touching the said premises, to the day of the date hereof, shall cease, and be no further prosecuted; and that each of the said parties shall pay, and bear his costs and charges, in anywise relating to or concerning the premises.

Secondly, we do also award and order, that the said A. B. shall, on or before the day of 18 pay to the said C. D. the sum of dollars.

And, lastly, we do award and order, that the said A. B. and the said C. D. shall, on the payment of the said sum of dollars, execute general releases to each other in due form of law, and sufficient for the releasing of all actions, suits, quarrels, controversies, and demands whatsoever, touch-

ing or concerning the premises aforesaid, or in any manner relating thereto, from their transactions with each other, up to the day of last past. (The day of the date of the arbitration bonds.)

In testimony whereof, we have hereunto set our hands, this day of 18

E. F.
G. H.
I. J.

Judgment can only be rendered upon an award made for the payment of money and the costs of arbitration.

Form of a release in pursuance of an award.

Know all men by these presents, that I, A. B., of the county of and state of Illinois, have remised, released, and forever quitclaimed, and by these presents do remise, release, and forever quitclaim unto C. D. of the said county and state, his heirs, executors, and administrators, all action and actions, cause and causes of action, judgments, suits, controversies, trespasses, debts, duties, damages, accounts, and demands whatsoever, from the commencement of our transactions with each other, to the day of last past; save, and except (the things awarded) under the terms, and in the manner prescribed in and by a certain award, made the day of A. D. 18 by E. F., G. H., and I. J. of the said county and state, and on a reference to them of all disputes and controversies, between me and the said C. D. In witness whereof, I have here unto set my hand and seal, this day of 18 A. B. [L. S.]

Executed and delivered in the presence of K. L.

CHAPTER IV.

ASSAULT, ASSAULT AND BATTERY, AND AFFRAYS.

By section 12 of the act of January 23, 1829, it is enacted that "Justices of the peace shall have original exclusive jurisdiction in all cases of assault, and assaults and battery, and affrays, wherein the people are plaintiff, subject to an appeal to the circuit court, as provided by law. In all appeals to the circuit court, from the judgment of justices of the peace, in cases of assault, assault and battery, or affrays, the circuit

court shall proceed to hear and determine the cause; and if the defendant pleads not guilty, the trial shall be by jury, and said court shall give such judgment and assess such fine as shall be deemed just." *Gale's Stat.*, 421. 4 *Scam. Rep.*, 197.

1. *Of assault.*

Crim. Code, Sec. 51. An assault is an unlawful attempt, coupled with a present ability to commit a violent injury on the person of another.

An assault is an attempt, or offer, with force and violence, to do a corporeal hurt to another, as by striking at him with or without a weapon and missing him, or presenting a gun at him at a distance to which the gun will carry, or pointing a pitch-fork at him standing within reach of it, or by holding up one's fist at him, or any other such like act done in an angry, or threatening manner, or by drawing a sword and waving it in a menacing manner. 1 *Bac. Ab.*, 242. 3 *Bl. Com.*, 120. 1 *Burn's Justice*, 112.

Striking violently, with a club, horses before a carriage in which a person was riding, was held to be an assault upon the person. *Penn. Rep.*, 229.

It is an assault to attempt to run against the wagon of another person on the highway. The horse and cart of the defendant being merely a machine, could as well be directed against the prosecutor as an inanimate object. 1 *Wheeler's Crim. Cas.*, 364.

To pursue a man with a dangerous weapon, coming so near him that danger to his person may be reasonably apprehended, is an assault. 5 *City Hall Rec.*, 95. So, riding after a person and obliging him to run away into a garden to avoid being beaten, is an assault. 3 *Car. & P.*, 373. So, if one person advance in a threatening attitude towards another to strike him, and be stopped just before he is near enough for his blow to take effect, it is an assault. *Arch. Crim. Pl.*, 346.

It is an assault for a master to take indecent liberties with a female scholar, without her consent, though she does not resist; or for a medical man unnecessarily to strip a female patient naked, under pretence that he cannot otherwise judge of her illness, if he himself takes off her clothes; or for parish officers to cut off the hair of a pauper, in the poor house, by force, and against her will. *Arch. Crim. Pl.*, 345.

Notwithstanding the many ancient opinions to the contrary, it seems to be agreed at this day that mere words cannot amount to an assault. 1 *Hawk.*, 134. 1 *Bac. Ab.*, 243.

If very provoking language is given, without reasonable cause, and the party offended is tempted to strike the other, and an action brought, and the general issue pleaded, few juries would give damages to carry costs, (under the English statutes,) and few judges would certify. 1 *Bac. Ab.*, 243.

And where a man, laying his hand upon his sword, said, if it were not assize time, I would not take such language from you, this was held to be no assault, for the words explained that he did not design to do him any corporeal hurt at that time. A man's intention must operate with his act in constituting an assault. 1 *Mod.*, 3. *Bull. N. P.*, 15. 1 *Bac. Ab.*, 241. So if a man raise his hand against another within striking distance, saying, if it was not for your gray hairs I would tear your heart out, it is not an assault, because the words explain the action, and repel the idea of an intent to strike. 1 *Serg. & Raw.*, 347.

It is not an assault to point a cane at one in derision in the street, for the purpose of insulting him, but without an intention of striking him. 6 *City Hall Rec.*, 56.

And it is no assault to strike at a person at such a distance that he cannot touch him, or put him in fear, or to restrain him from mischief to himself. 2 *Roll.*, 547. 1 *Vent.*, 256.

A churchwarden may justify taking off the hat of a person who wears it in church at the time of divine service, if, upon being desired to take it off, he refuses to do so. 1 *Saund.*, 13.

2. *Of battery.*

Crim. Code, *Sec.* 53. "Assault and battery is the unlawful beating of another."

A battery is where an attempt is carried into execution to the injury of a person, in an angry, revengeful, rude, or insolent manner. 1 *Salk.*, 384. 6 *Mod.*, 149. It is said that every battery includes an assault, and if the defendant be found guilty of the battery, it is sufficient. 1 *Bac. Ab.*, 243.

The least touching of another's person wilfully, or in anger, is a battery, for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner. 3 *Bl. Com.*, 120.

A battery may be committed by striking with the hand, or with any instrument. *Arch. Crim. Pl.*, 346.

If two or more persons meet in a narrow passage, and, without any violence or design of harm, the one touches the other gently, it will be no battery. But if either of them uses violence to force his way in a rude manner, or any struggle is made about the passage to that degree as to do hurt, it will be a battery. *Jac. Law Dic.*, *title Battery.*

An assault and battery may be committed by holding a person by the arm, or by spitting in his face; 6 *Mod.*, 172; by throwing a squib at him; 2 *W. Bl.*, 892; by striking a horse upon which he is riding, whereby he is thrown; 1 *Mod.*, 24; or the like. *Arch. Crim. Pl.*, 346.

So, if a person pushes a drunken man against another, and

hurts him. But if the defendant intended to do a right act, as to assist him in going along the street without hurt, and in so doing an injury is done, he will not be answerable. *Bull. N. P.*, 16.

Striking any thing attached to a person, as a cane, &c., if intended as a rudeness and affront, is a battery. 1 *Dall. Rep.*, 114.

To sprinkle paint from a brush out of the second story of a house upon a person, is an assault and battery. 1 *Wheeler Crim. Cas.*, 62.

Striking a person in the face with the fist or a glove, is an assault and battery, if it does not appear that the blow was necessary for self-defence. 1 *Wheeler Crim. Cas.*, 405.

And the act causing the injury need not proceed from the immediate assault of the defendant, as where the defendant threw a lighted squib into a market place, which being tossed from hand to hand by different persons, at last hit the plaintiff in the face, and put out his eye; it was adjudged that this was actionable as an assault and battery. 1 *Bac. Ab.*, 243.

Where M., the owner of a horse and gig, in company with J., whom he invited to ride with him, drove with great speed, and knocked down a woman in the street; it was held that, if J. assented to such immoderate driving, he was responsible for the injury. 5 *City Hall Rec.*, 77.

If, by a sudden fright, a horse runs away with his rider and runs against a man, it is no battery, and this may be given in evidence on the general issue; but if it were occasioned by a third person whipping the horse, such person would be the trespasser. 1 *Bac. Ab.*, 244.

Where an injury is purely accidental, and the party wholly without fault, it will not amount to a battery. 2 *Roll. Ab.*, 548.

Thus, where the defendant was indicted for throwing down skins in a yard, being a public place, by which a man's eye was beaten out, it appearing that the wind blew the skins out of the way, and that the injury was caused by this circumstance, the defendant was acquitted. 1 *Str.*, 190.

In cases of assault and assault and battery, as in all other cases, if several act in concert, encouraging one another and co-operating, they are all equally guilty, though one only committed the actual assault, &c. *Roscoe's Crim. Ev.*, 210. 4 *Bl. Com.*, 36.

A person advising, promoting, or aiding the commission of an assault and battery, is liable, though he was not present at the time the trespass was committed. 5 *Ohio Rep.*, 251. 2 *Scam. Rep.*, 26.

3. *When an assault and battery is justifiable.*

In some cases an assault and battery is justifiable and lawful; 3 *Bl. Com.*, 3; as, if a parent in a reasonable manner chastise

his child, or a master his servant, being actually in his service at the time, or a schoolmaster his scholar, or a jailer his prisoner, or if a man gently lay hands on another and thereby stay him from inciting a dog against a third person. 3 *Bl. Com.*, 120. 1 *Bac. Ab.*, 244.

It is a good defence, in justification even of a wounding or mayhem, to prove that the prosecutor assaulted or beat the defendant first, and the defendant committed the alleged battery merely in his own defence. *Arch. Crim. Pl.*, 347. 3 *Bl. Com.*, 120.

Thus, if A. lift up his stick and offer to strike B., it is a sufficient assault to justify B. in striking A., for he need not stay till A. has actually struck him. *Bull. N. P.*, 18.

So, a husband may justify a battery in defence of his wife, a wife in defence of her husband, a parent in defence of his child, a child in defence of his parent, a master in defence of his servant, and a servant in defence of his master. 1 *Bac. Ab.*, 244. 1 *Russell*, 608.

But, in all these cases, the battery must be such only as was necessary to the defence of the party or his relation; for, if it were excessive, or if it were greater than was necessary for mere defence, the prior assault would be no justification. *Bull. N. P.*, 18.

In Cockcroft *v.* Smith, 1 *Salk.*, 642, Holt, Ch. J., says, "that for every assault he did not think it reasonable a man should be banged with a cudgel; that the meaning of the plea (*son assault demense*) was, that he struck in his own defence." The facts of the case are not given, but from what appears in Lord Raymond, 177, it was an action for mayhem, in biting off the plaintiff's finger, and the first assault by the plaintiff was tilting the form on which the defendant sat, whereby the defendant fell; or, according to 11 *Mod.*, 43, in a scuffle the plaintiff ran his finger towards the defendant's eyes, whereupon the defendant bit off a joint. It was held in that case a good defence. See 2 *Wend. Rep.*, 497.

And, in the case of The State *v.* Wood, 1 *Bay.*, 351, the defendant was indicted for an assault and battery on a woman. He proved that she struck him first with a cow-skin, whereupon he gave her several severe blows with a large stick, and left her speechless on the ground. The court directed a verdict against the defendant. They agreed that the general rule of law is, that it is a justification to the defendant that the prosecutor gave the first blow; but the resistance ought to be in proportion to the injury offered. Where a man disarms the aggressor, or puts it out of his power to do further injury, he ought to desist from further violence, and if he commits any further outrage, he becomes the aggressor.

It will, however, be a sufficient answer to this defence, to prove that the first assault was justifiable. *Arch. Crim. Pl.*, 347.

It is a good defence to prove that the alleged battery was merely an amicable contest; as that the defendant wrestled with the injured person for a wager. *Arch. Crim. Pl.*, 347.

That the injury happened by accident, whilst the defendant was engaged in some sport or game, which was neither unlawful nor dangerous, is a good defence. *Arch. Crim. Pl.*, 327, 347.

But if, in the course of an unlawful act, a blow is struck, as where two persons are engaged in fighting, and one of them accidentally and unintentionally strikes a third person, this is not such an accident as will prevent the blow from being a battery. *Roscoe's Crim. Ev.*, 211.

And it has been held that it was no defence to allege that the plaintiff and defendant fought together by consent, the fighting itself being unlawful. *Bull. N. P.*, 16. So if one license another to beat him, such license is no defence because it is against the peace. 1 *Bac. Ab.*, 243.

The defendant may justify a battery, by proving that he committed it in defence of his goods or possession; 3 *Bl. Com.*, 120; as, for instance, to remove a person out of his close or house, or to prevent him from entering it, or to restrain him from taking or destroying his goods, from taking or rescuing cattle, &c., in his custody upon a distress, or the like. *Arch. Crim. Pl.*, 347, *a*. 4 *Johns. Rep.*, 150. 12 *Wend. Rep.*, 489.

In the case of a mere trespass, unless the trespass is accompanied with violence, the owner of the land, house, or goods will not be justified in assaulting the trespasser in the first instance; but should request him to depart or desist, and if he refuses, should gently lay his hands on him for the purpose of removing him, and if he resist with force, then force may be used in return by the owner, sufficient to effect his expulsion. 8 *Term Rep.*, 78, 299. 2 *Salk.*, 641.

But if the trespasser enter the close or house with violence, in such case the owner may, without a previous request to depart; use violence in return, in the first instance. The force used, however, must be proportioned to the violence of the trespasser, and be used only for the purpose of subduing his violence. 8 *Term. Rep.*, 78. 2 *Salk.*, 641.

In answer to a justification in defence of his possession, the other party may prove that the battery was excessive, or justify the alleged trespass on the defendant's possession, by proving that he had a right of way over the close, or the like. *Arch. Crim. Pl.*, 347, *a*.

Of an affray.

Crim. Code, sec. 114. "If two or more persons shall, by agreement, fight in a public place, to the terror of the citizens of this state, the person so offending, shall be deemed guilty of an affray." *Gale's Stat.*, 219. 4 *Scam. Rep.*, 180.

If the fighting be in a private place, out of the seeing or

hearing of any except the parties concerned, it will not be an affray, as it cannot be said to be to the terror of the people. 4 *Bl. Com.*, 145.

At the common law an affray differs from a riot in not being premeditated. Thus, if a number of persons meet together at a fair, or market, or upon any other lawful or innocent occacasion, and happen on a sudden quarrel to engage in fighting, they are not guilty of a riot, but of an affray only, of which none are guilty but those who actually engage in it, because the design of their meeting was innocent and lawful, and the breach of the peace happened without any previous intention. 1 *Hawk.*, 134.

In the case of Dougherty *v.* The People, 4 *Scam. Rep.*, 179, Caton, Justice, in delivering the opinion of the court, says: "We have departed very widely from the common law in our description of affrays and riots. At common law an affray (or, as it is frequently called, a sudden affray) is an unpremeditated breach of the peace, by a lawful assemblage, as at a theatre, a wake, or a market; but by our law, it is almost the very reverse. By the 114th section of the Criminal Code, it is provided that, if two or more persons shall, by agreement, fight in a public place, they are guilty of an affray. Thus we see that what at common law might be a riot of an aggravated character, (as if three or more on a side fight by agreement,) is by our law reduced to an affray; while that which at common law constituted an affray might go unpunished, unless it is embraced in our definition of a riot, or is of that character punishable as a simple assault and battery."

It is said, that no quarrelsome or threatening words whatsoever shall amount to an affray, and that no one can justify laying his hands on those who shall barely quarrel with angry words, without coming to blows; yet it seemeth that the constable may, at the request of the party threatened, carry the person who threatens to beat him before a justice, in order to find sureties for the peace. 1 *Hawk.*, 135.

When an affray is about taking place, and a man mingles in it, he becomes a party to the affray and must take the consequences. If his object is to suppress the affray, he must give notice of his peaceable intention, or he will not be justified. 1 *East*, 304.

In proceedings against two persons for an affray, one may be acquitted and the other convicted. 2 *Term Rep.*, 198.

How far an affray may be suppressed by a private person.

It seems agreed that any one who sees another fighting, may lawfully part them, whatsoever consequences may ensue, 4 *Bl. Com.*, 145, and may also stay them till the heat be over, and then deliver them to a constable, to be carried before a justice to find sureties for the peace. 1 *Hawk.*, 136.

And the law doth encourage him thereto; for if he receives any harm by the affrayers, he shall have his remedy by law against them; and, if the affrayers receive hurt by the endeavoring only to part them, the standers by may justify the same, and the affrayers have no remedy by law. 1 *Burn's Justice*, 18.

If either of the parties be slain, or wounded, or so stricken that he falleth down for dead; in that case the standers by ought to apprehend the party so slaying, wounding, or striking, or to endeavor to do the same by hue and cry, or else for his escape they shall be fined and imprisoned. 1 *Burn's Justice*, 19. 3 *Inst.*, 158.

How far by a constable.

A constable is not only empowered, as all private persons are, to part an affray which happens in his presence, but is also bound at his peril to use his best endeavors to this purpose; and not only to do his utmost himself, but also to demand the assistance of others, which if they refuse to give him, they are punishable with fine and imprisonment. 1 *Hawk.*, 137. And it is said that if a constable sees persons either actually engaged in an affray, as by striking or offering to strike, or drawing their weapons, or the like; or upon the point of entering upon an affray, as where one shall threaten to kill, wound, or beat another, he may either carry the offender before a justice to find sureties for the peace, or he may imprison him of his own authority for a reasonable time, till the heat shall be over, and, also, afterwards detain him till he find such surety. But it seems that he has no power to imprison such an offender in any other manner or for any other purpose; for he cannot justify the committing of an affrayer to jail, till he shall be punished for his offence: and it is said that he ought not to lay hands on those who barely contend with hot words, without any threats of personal hurt; and that all which he can do in such case is, to command them, under pain of imprisonment, to avoid fighting. 4 *Bl. Com.*, 145. 1 *Hawk.*, 137.

But he is so far intrusted with power over all actual affrays that, though he himself is a sufferer by them and therefore liable to be objected against, as likely to be partial in his own cause, yet he may suppress them, and therefore, if an assault be made upon him, he may not only defend himself, but also imprison the offender, in the same manner as if he were no way a party. 1 *Hawk.*, 137.

It is settled that, in case of an actual affray made in a house, within the view or hearing of a constable, or where those who have made the affray in his presence, fly to a house and are pursued by him, he may break open doors to arrest the affrayers or suppress the tumult. 1 *Chit. Crim. Law*, 56.

But it is said that a constable hath no power to arrest a anm

for an affray done out of his own view without a warrant from a justice, unless a felony were done, or likely to be done; for it is the proper business of a constable to preserve the peace, and not to punish the breach of it. 1 *Hawk.*, 137.

How far by a justice of the peace.

There is no doubt but that a justice of the peace may, and must, do all such things for the purpose of suppressing an affray, which a private man or constable is either enabled or required by law to do: but it is said that he cannot, without a warrant, authorize the arrest of any person for an affray out of his view; yet in such case he may make his warrant to bring the offender before him, in order to compel him to find sureties for the peace. 4 *Burn's Justice*, 20. 1 *Hawk.*, 137.

Statute provisions relative to proceedings in cases of assaults, assaults and battery, and affrays. Gale's Stat., 414.

"Sec. 1. *Be it enacted by the people of the state of Illinois, represented in the General Assembly*, That hereafter the justices of the peace of the several counties of this state shall have jurisdiction of all cases of assaults, and of assault and battery, and affrays: and upon the knowledge of any justice of the peace, or information of any person upon oath, (except the party offending,) shall issue his warrant to any constable of said county, for the arrest of such person as may be charged with either of said offences; and upon the arrest of such person, shall order the constable attending the trial, to summon six jurors of the neighborhood, not in any wise related to either of the parties, (unless the party accused shall dispense with such jury or require twelve, in which case twelve jurors shall be summoned,) which jury, when summoned, shall attend, and after being sworn, if they find the defendant guilty, shall assess the fine such defendant shall pay: *Provided*, the same shall not exceed one hundred dollars, nor be less than three dollars.

"Sec. 2. That upon the jury returning their verdict of guilty, and the assessment of the fine, the justice shall record the same in his docket, or record book, and proceed to render judgment thereon for the amount of the said fine and costs; but if the jury return a verdict of not guilty, the justice shall record the same, and discharge the defendant or defendants without costs.

"Sec. 3. That upon the rendition of such judgment, the justice shall immediately issue execution against the said defendant or defendants, for the amount of the fine and all costs; which said execution may be levied upon any personal property of said defendant or defendants, and the same shall be sold for whatever it will bring in cash, the constable giving twenty days public notice of the day of sale, by putting up written

advertisements at three of the most public places in the county: *Provided, however*, That if the party convicted under this act have a family, then the constable shall reserve from execution one bed and bedding, one cow, and ten dollars worth of household and kitchen furniture.

"SEC. 4. If the constable shall return upon such execution, that the defendant or defendants have no goods and chattels whereof to make the money, the justice shall issue a *capias* against the body of the defendant or defendants, and the constable shall arrest such person or persons, and commit him or them to the jail of the county, there to remain forty-eight hours; and if the fine exceed ten dollars, then to remain in said jail twenty-four hours for every five dollars over and above the said ten dollars, and so on in proportion to the amount of said fine.

"SEC. 5. If any person, who shall be convicted under this act, shall wish to appeal to the circuit court, he shall signify the same to the justice of the peace who gave the judgment, and the justice shall give him a statement of the amount of the fine and costs, and upon producing the same to the clerk of the circuit court of the proper county, the clerk shall write a bond to the people of the state of Illinois, in a penalty double the amount of the fine, and sufficient to cover all costs, conditioned for the payment of the amount of whatever judgment the court may render against said defendant, which the said party appealing shall execute, with sufficient security, to be approved of by the said clerk; and when such bond shall be executed, the clerk shall notify the justice who tried the cause thereof, and the said justice shall stay all further proceedings, and return the papers to the next succeeding circuit court, when the same shall be tried, unless for good cause shown, the court shall continue it: *Provided*, all such appeals shall be prayed for, and the bond executed within five days after judgment rendered.

"SEC. 6. If the defendant shall be found guilty in the circuit court, (where the trial shall be by jury,) judgment shall be rendered against both principal and security in the appeal bond, for the amount of the fine assessed by the jury in said court, and all costs that may have accrued.

"SEC. 7. If any person shall be dissatisfied with the verdict of the jury, given before any justice of the peace, because of the fine being too low, or because the defendant may have been acquitted, he shall be permitted to remove the said case into the circuit court, upon his executing bond to the people of the state of Illinois, before the clerk, (which bond the clerk shall write,) in a penalty sufficient to cover all costs that have or may accrue, conditioned for the payment of all costs, in case the defendant shall be acquitted, or the fine not increased; which bond shall be executed in ten days after the judgment of the justice shall have been given; and when said bond is executed, the clerk shall notify the justice thereof, and said

justice shall return all the proceedings to the said court; and if the defendant shall be acquitted in the circuit court, or the fine not increased by the jury, the court shall render judgment against the party who removed the said case into the circuit court, and his security in the appeal bond, for all costs occasioned by the appeal: *Provided*, the party removing a case into the circuit court shall never be a witness against the defendant in the appeal in said court, upon the trial of such appeal."

The statute giving jurisdiction to justices of the peace of cases of assaults, and of assaults and batteries, confers on the circuit court, where the appeal is brought, the right to try the case as an original one. 2 *Scam. Rep.*, 7.

The bond ought strictly to be in compliance with the provisions of the statute. The statute does not authorize appeal bonds to be amended, in criminal cases. 1 *Scam. Rep.*, 289.

"SEC. 8. When the defendant appeals to the circuit court, it shall be the duty of the justice to return to the clerk, when he returns the papers, the names of all material witnesses who testified against the said defendant, and the clerk shall issue subpœnas for the same.

"Sec. 9. When the case is removed into the circuit court, as provided by the seventh section of this act, the party removing it shall cause a summons to be issued and served upon the defendant, notifying him of the appeal; and if the defendant cannot be found in the county, to serve said process upon, the case shall not be continued; but the court shall cause his appearance to be entered, and proceed to trial, as though the defendant were present, and had filed the plea of not guilty.

"SEC. 10. Upon the trial of appeals, no exception shall be allowed to any process which the justice may have issued, but all appeals shall be tried upon their merits. And it shall be the duty of the attorney general and circuit attorney of the proper county, to prosecute in all such cases of appeals without fee.

"SEC. 11. If the person accused shall, upon his appearance before such justice, confess himself guilty of the charge against him, and dispense with the trial by jury, the justice shall hear the evidence, assess the fine, and render judgment thereon, and issue execution as before directed, subject to appeal, as before provided for: *Provided*, he shall not assess a higher fine than one hundred dollars, nor lower than three dollars.

"SEC. 12. All the offences before described, which shall have been committed before this act takes effect, shall be proceeded upon, tried, and punished according to the laws in existence at the time of their commission.

"SEC. 13. No person shall be proceeded against for the commission of any of the offences herein enumerated, after the expiration of twelve months from the time the offence was committed, unless such offender shall withdraw himself from

the county for the purpose of avoiding trial, in which case he shall be tried at any time within twelve months after his return or apprehension.

"SEC. 14. The constable charged with the collection of any fine under this act, shall account for and pay over to the county commissioners' court, at every regular term thereof, all moneys which he may have collected under this act; and upon a failure to do so, he shall forfeit and pay double the amount of money so received, to be recovered in the name of the county commissioners of the proper county, for the use of the county, in any court having jurisdiction thereof. The constable shall also be authorized to receive all fines before execution issued, and shall account therefor, and pay over the same in the same manner, and under the same penalties as before provided.

"SEC. 15. And it shall be the duty of each of the justices of the several counties to return to the county commissioners' court, at each regular term thereof, a list of all fines before them assessed, stating the name or names of the defendant or defendants, and of the constable or constables charged with the collection of said fine or fines, to enable the said court to settle with the said constables; and a failure of any such justice, before whom any fine shall have been assessed under this act, to make such return, shall work a forfeiture of double the amount of the fines assessed before him, to be recovered as prescribed in the preceding section.

"SEC. 16. The county commissioners' court shall pay over to the county treasurers respectively, all moneys by them received as aforesaid, and take his receipt therefor; which receipt shall be deposited with the clerk of said court, and by him preserved; and the county treasurer shall account for said moneys in the same manner that he accounts for other public money by him received.

"SEC. 17. That no charge for jurors' or witnesses' fees shall be allowed either before the justices or in the circuit courts."

FORMS OF PROCEEDINGS IN CASES OF ASSAULTS, ASSAULT AND BATTERY, AND AFFRAYS.

Form of a complaint for an assault.

State of Illinois, }
La Salle county, } ss. The information and complaint of A. B. of *Ottawa*, in said county, who being duly sworn, upon his oath says, that C. D. of *Lorain precinct*, in the said county, on the day of 18 with force and arms, at in the county aforesaid, him, the said A. B., did unlawfully make an attempt to strike, beat, and wound with a

cane, then and there having the ability to commit the said injury.

He therefore prays that the said C. D. may be arrested and dealt with according to law.

Subscribed and sworn before me, this day of 18 } A. B.

William Sly,
Justice of the peace.

Form of an information and complaint for assault and battery.

State of Illinois, }
La Salle county, } ss. The information and complaint of A. B. of in said county, who being duly sworn, upon his oath says, that C. D. of in the said county, on the day of 18 with force and arms, at *Lorain precinct*, in the county aforesaid, in and upon him, the said A. B., did make an assault, and with his hands and feet did then and there beat, bruise, wound, and injure him, the said A. B.

He therefore prays that the said C. D. may be arrested and dealt with according to law.

Subscribed and sworn before me, this day of 18 } A. B.

William Sly,
Justice of the peace.

Form of an information and complaint for an affray.

State of Illinois, }
La Salle county, } ss. The information and complaint of A. B., who being duly sworn, upon his oath says, that C. D. and G. H., on the day of 18 at *Lorain precinct*, in the county aforesaid, did, by agreement, fight in a public place, that is to say, in the public highway there situate, and did then and there make an affray to the terror of the citizens of this state then and there being.

He therefore prays that the said C. D. and G. H. may be arrested and dealt with according to law.

Sworn and subscribed before me, this day of 18 } A. B.

William Sly,
Justice of the peace.

Form of a warrant for an assault.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county:

Whereas, A. B. hath this day made complaint in writing, upon oath, before *William Sly*, Esquire, a justice of the peace

of said county, that, on the day of 18 at *Lorain precinct*, in the county aforesaid, C. D. did unlawfully attempt to violently strike, beat, and wound him, the said A. B., with a cane, then and there having the ability to commit the said injury.

These are, therefore, to command you forthwith to arrest the said C. D., and bring him before the said justice, to answer unto the said complaint, and to be further dealt with according to law.

Given under the hand and seal of the said justice, at *Lorain precinct*, in said county, the day of 18

William Sly. [L. S.]

Form of a warrant for assault and battery.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county:

Whereas, A. B. hath this day made complaint in writing, upon oath, before *William Sly*, Esquire, a justice of the peace of the said county, that, on the day of 18 at *Lorain precinct*, in the county aforesaid, C. D. did violently assault and beat him, the said A. B.

These are, therefore, to command you forthwith to arrest the said C. D., and bring him before the said justice to answer unto the said complaint, and to be further dealt with according to law.

Given under the hand and seal of the said justice, at *Lorain precinct*, in the said county, the day of 18

William Sly. [L. S.]

Form of a warrant for an affray.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county:

Whereas, A. B. hath this day made complaint in writing, upon oath, before *William Sly*, Esquire, a justice of the peace of said county, that, on the day of 18 at *Lorain precinct*, in the county aforesaid, C. D. and G. H. (if there are more persons engaged, name them) did, by agreement, fight in a public place, that is to say, in the public highway there situate, and did then and there make an affray to the terror of the citizens of this state then and there being.

These are, therefore, to command you forthwith to arrest the said C. D. and G. H. and bring them before the said justice to answer unto the said complaint, and to be further dealt with according to law.

Given under the hand and seal of the said justice, at *Lorain precinct*, in the said county, the day of 18

William Sly. [L. S.]

By sec. 5 of "An act to regulate the apprehension of offenders, and for other purposes," it is enacted that "Recognizances for assaults, batteries, and affrays, shall be for the appearance of the accused before the justice of the peace taking the same, or before some other justice of the county, on the day appointed by the justice for the trial of the offender." *Gale's Stat.*, 239.

Form of recognizance to appear before the justice.

State of Illinois, }
La Salle county, } ss. Be it remembered, that on this day of 18 C. D., of *Lorain precinct*, in the said county, and G. H., of in the said county, and I. J., of in the said county, personally come before me, *William Sly*, Esquire, a justice of the peace of said county, and severally and respectively acknowledge themselves to owe to the people of the state of Illinois, that is to say, the said C. D. the sum of *one hundred* dollars, and the said G. H. and I. J. the sum of *fifty* dollars each, to be levied off their respective goods and chattels, lands and tenements, to the use of the said people, if the said C. D. shall make default in the condition following:

The condition of this recognizance is such, that, if the said C. D. shall personally be and appear before the said justice at his office in *Lorain precinct*, on the day of 18 at a court then and there to be held before the said justice for the trial of an assault and battery alleged to have been committed by the said C. D. upon A. B., (or if for an assault or an affray state it here,) and to do and receive what shall by the court be then and there enjoined upon him, and shall not depart the court without leave; then this recognizance to be void, or else to remain in full force.

C. D.
Taken, subscribed, and acknowledged the } G. H.
day and year above written, before me, } I. J.

William Sly,
Justice of the peace.

Form of a venire.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county:

We command you to summon six (or "twelve," if the accused require that number) good and lawful men qualified to serve as jurors, and not exempt from such service by law, and who are not in any wise related either to A. B. or C. D., to be and appear before *William Sly*, Esquire, a justice of the peace of the said county, on the day of *instant*, at o'clock in the noon, at the office of the said justice, in

Lorain precinct, to make a jury for the trial of the said C. D. for an assault and battery upon the said A. B. And have you then and there a panel of jurors and this precept.

Given under the hand and seal of the said justice, the day of 18 *William Sly.* [L. S.]

Form of a juror's oath or affirmation.

You do swear by the ever living God, (or "you do solemnly, sincerely, and truly declare and affirm,") that you will well and truly try this issue of traverse between the people of the state of Illinois and C. D., the defendant, and a true verdict give therein, according to the evidence.

Form of a subpœna.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to E. F., G. H., I. J., and K. L.:

We command you, and every of you, that you do in your proper persons appear before *William Sly*, Esquire, a justice of the peace of said county, at his office in *Lorain precinct* in said county, (forthwith, or) on the day of 18 at o'clock it the noon, to testify the truth according to your knowledge touching an information and complaint against C. D. for an assault and battery (or "for an assault," or as the offence is,) for which the said C. D. is then and there to be tried, on the part of the people (or "on the part of the defendant.")

Given under the hand and seal of the said justice, the day of 18 *William Sly.* [L. S.]

Form of oath of witness.

You do swear in the presence of the ever living God, that the evidence you shall give in this issue of traverse between the people of the state of Illinois and C. D., the defendant, shall be the truth, the whole truth, and nothing but the truth.

Form of an affirmation.

You do solemnly, sincerely, and truly declare and affirm, that the evidence you shall give in this issue of traverse between the people of the state of Illinois and C. D., the defendant, shall be the truth, the whole truth, and nothing but the truth.

Form of oath or affirmation of constable on retiring with the jury.

You do swear by the ever living God, (or "you do solemnly,

sincerely, and truly declare and affirm,") that you will well and truly keep the persons sworn on this jury together, in some private and convenient place, without meat or drink, water excepted; that you will not suffer any person to speak to them, nor speak to them yourself, without leave of the court, except to ask them whether they have agreed upon their verdict, until they have agreed upon their verdict.

Form of taking the verdict.

Gentlemen of the jury, please to answer to your names as you are called. (Then call them one by one.)

Have you agreed upon you verdict? (Jury answer yes.) Who shall speak for you? (The foreman rises.) How say you, do you find the defendant guilty of the assault and battery (or other offence) whereof he stands charged, or not guilty?

The foreman then answers, "We find the defendant guilty, and assess the fine which he shall pay at *ten* dollars," (or "we find the defindant not guilty.")

The justice will then enter the verdict in his docket or record book, and then say to the jury: "Gentlemen, hearken to your verdict as the court hath recorded it. You say: We find the defendant guilty, and assess the fine which he shall pay at *ten* dollars; and so say you all," (or, we find the defendant not guilty.)

Form of polling a jury.

Gentlemen of the jury, answer to your names as you are called: "L. M., how say you, do you find the defendant guilty of the assault and battery whereof he stands charged, and assess the fine which he shall pay at *ten* dollars?" Call the rest and ask them one by one, "Is this your verdict?"

Form of minutes and proceedings to be entered in the docket or record book, where the defendant is convicted.

The People }
v.
C. D. } 1844, 20th August. Information and complaint of A. B. against C. D., for an assault and battery, taken upon oath and filed, and warrant issued against C. D. Warrant delivered to T. C., constable.

Justice's Fees.	
Taking complaint under oath	25
Warrant	25
Oath for adjournment	6¼
2 Subpœnas	50
Venire	25
Swearing 6 jurors	37½
Swearing 2 witnesses	12½
Swearing constable to attend jury	6¼
Entering judgment	25
Issuing execution	25
	$2.37½

Constable's Fees.	
Serving warrant	25
Mileage on same	18¾
Subpœnaing 2 witnesses	25
Mileage on same	37½
Summoning jury	50
	$1.56¼
	2.37½
	$3.94

1844, 21st August. Defendant in court, in custody of T. C., constable. Upon hearing the information read, the defendant pleaded not guilty. The suit continued till the 25th August, inst., at one o'clock P. M. The defendant entered into recognizance with G. H. and I. J., sureties, to appear, &c.

Venire issued, returnable at the same time and place.

Subpœna issued on the part of the people. Subpœna issued for the defendant.

1844, 25th August. A. B., the complainant, and C. D., the defendant, appeared. Venire returned by T. C., constable, with a panel of jurors. Jury called and sworn. Witnesses sworn on the part of the people, J. M. and E. N.

After hearing the proofs and allegations, the jury retire under the charge of the constable, and, upon returning into court, say, "We find the defendant guilty, and assess the fine which he shall pay at *ten* dollars."

1844, 25th August. It is therefore adjudged and determined that the said C. D. pay the said fine assessed by the jury at ten dollars, and also the sum of three dollars and ninety-four cents costs.

Fine	$10.00
Costs	3.94
	$13.94

The like, when the defendant is discharged.

The People }
v.
C. D. } 1844, 20th August. Information and complaint of A. B. against C. D., for an assault and battery, taken upon oath and filed, and warrant issued against C. D. Warrant delivered to T. C., constable.

1844, 22d August. Defendant in court in custody of T. C.,

constable. Upon hearing the information read, the defendant pleads not guilty.

Subpœna issued on the part of the people. Subpœna issued on the part of the defendant.

The defendant dispenses with a jury, and the cause is submitted to the justice for trial.

Witnesses sworn on the part of the people, A. B., J. M., and E. N.

After hearing the proofs and allegations of the parties, the justice finds the defendant not guilty of the charge, and, thereupon, adjudges and determines that the said C. D. be discharged, and acquitted of the said charge.

If the complaint was malicious, then add the following.

And it appearing to me, *William Sly*, Esquire, the justice before whom the said suit was tried, that there was no reasonable ground for said prosecution, and that it was maliciously entered, it is, therefore, adjudged and determined that the said prosecutor, A. B., pay the costs of this suit, and judgment is entered against him for the sum of *seven* dollars, the amount of said costs.

Form of execution to levy fine and costs.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of said county:

Whereas, upon the information and complaint of A. B., lately exhibited before *William Sly*, Esquire, a justice of the peace of said county, upon oath, against C. D., for an assault and battery, the said C. D. was arrested and tried before the said justice and a jury, and found guilty of the charge, and the said jury assessed the fine which the said C. D. should pay, at the sum of *ten* dollars, and it was thereupon adjudged and determined by the said justice, that the said C. D. pay the fine so assessed, and, also, the sum of *three* dollars and *ninety-four* cents costs.

We, therefore, command you immediately to levy the said sum of *ten* dollars so assessed, and, also, the said sum of *three* dollars and *ninety-four* cents costs, by distress and sale of the goods and chattels of the said C. D., (except such goods and chattels as are by law exempt from execution,) giving twenty days public notice of the day of sale, by putting up written advertisements at three of the most public places in the county. And do you return this precept with all convenient speed, with what you shall do thereon. Hereof fail not.

Given under the hand and seal of the said justice, the day of 18 *William Sly.* [L. S.]

Form of execution to levy costs in case of a malicious prosecution.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of said county:

Whereas, upon the information and complaint of A. B., lately exhibited before *William Sly*, Esquire, a justice of the peace of said county, upon oath, against C. D., for an assault and battery, the said C. D. was arrested and tried before the said justice, (or, "and a jury,") and found not to be guilty of the charge, and it was thereupon adjudged and determined by the said justice, that the said C. D. be discharged and acquitted of the said charge. And, it appearing to the said justice on the said trial, that there was no reasonable ground for said prosecution, and that it was maliciously entered, it was adjudged and determined that the said prosecutor, A. B., pay the costs of said suit, and judgment was thereupon entered against him for the sum of *seven* dollars, the amount of said costs.

We, therefore, command you to levy the said sum of *seven* dollars, costs as aforesaid, by distress and sale of the goods and chattels of the said A. B., (except such goods and chattels as are by law exempt from execution,) giving twenty days public notice of the day of sale, by putting up written advertisements at three of the most public places in the county. And do you return this precept with all convenient speed, with what you shall do thereon. Hereof fail not.

Given under the hand and seal of the said justice, the day of 18 *William Sly*. [L. S.]

Endorsement of a levy by a constable.

1844, 25th August. By virtue of the within execution, I have this day levied on one bay horse, &c.

Thomas J. True, Constable.

Advertisement.

By virtue of an execution against the goods and chattels of C. D., I have levied on one bay horse, &c., which I shall expose to sale, at public vendue, on the 16th day of September next, at two o'clock in the afternoon, at the dwelling house of the said C. D., in *Lorain precinct*. Dated, August 26th, 1844. *Thomas J. True*, Constable.

Return of the constable when fine and costs are collected.

I do hereby certify and return, that I have levied the fine and costs mentioned in the within execution, and have paid

over the said fine to the county commissioners' court, and have the costs ready to be paid over as required. Dated,

Thomas J. True, Constable.

Return of constable when no goods or chattels can be found.

I do hereby certify and return, that I have made diligent search for, but do not know of, nor can find any goods or chattels of, the said C. D., whereof I may, by distress and sale, levy the sum of *ten* dollars fine, and *three* dollars and *ninety-four* cents costs, pursuant to the command of the within execution. Dated, &c. *Thomas J. True*, Constable.

Form of a capias against the body, or mittimus.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of said county, and to the keeper of the common jail of the said county:

Whereas, upon the information and complaint of A. B., lately exhibited before *William Sly*, Esquire, a justice of the peace of said county, upon oath, against C. D., for an assault and battery, the said C. D. was arrested and tried before the said justice and a jury, and found guilty of the charge, and the said jury assessed the fine which he should pay at the sum of *ten* dollars, and it was thereupon adjudged and determined by the said justice, that the said C. D. should pay the said fine so assessed, and, also, the sum of *three* dollars and *ninety-four* cents costs.

And whereas, it appears by the return of *Thomas J. True*, constable, dated the day of 18 that he hath made diligent search for, but doth not know of, nor can find, any goods or chattels of the said C. D., by distress and sale whereof the said sum of *ten* dollars fine, and *three* dollars and *ninety-four* cents costs, may be levied pursuant to the command of our writ of execution to him delivered for that purpose.

We, therefore, command you to apprehend the said C. D., and convey him to the common jail of the said county, and deliver him into the custody of the said keeper. And you, the said keeper, are hereby required to receive the said C. D. into your custody, in the said jail, and him there safely keep for the space of *forty-eight* hours, unless the said fine and costs shall be sooner satisfied, or until he shall be discharged by due course of law.

Given under the hand and seal of the said justice, the day of 18 *William Sly*. [L. S.]

CHAPTER V.

BASTARDY.

All persons who are not only begotten but born out of lawful matrimony, are bastards by the common law; but, by the civil law, those born before marriage are legitimated by a subsequent marriage; for, by the civil law, all persons adopted into a man's family were inheritable, and the canonists have allowed of this notion, because the subsequent marriage, they say, takes away the preceding guilt, and shows a consent from the beginning. 1 *Bac. Ab.*, 512. 1 *Bl. Com.*, 454.

The civil law upon this subject has been adopted in this state by statute, which provides that, if the mother of any bastard child and the reputed father shall, at any time after its birth, intermarry, the said child shall in all respects be deemed and held legitimate. *Gale's Stat.*, 333.

By sec. 1 of "An act to provide for the maintenance of illegitimate children," it is enacted "That when any unmarried woman, who shall be pregnant or delivered of a child, which by law would be deemed a bastard, shall make complaint to any one or more of the justices of the peace of the county where she may be so pregnant or delivered, and shall accuse, under oath or affirmation, any person with being the father of such child, it shall be the duty of such justice or justices to issue a warrant, directed to the sheriff or any constable of such county, against the person so accused, and cause him to be brought forthwith before him or them. Upon his appearance, it shall be the duty of the said justice or justices, to examine the said woman, upon oath or affirmation, in the presence of the man alleged to be the father of the child, touching the charge against him. If the said justice or justices shall be of opinion that sufficient cause appears, it shall be his or their duty to bind the person so accused, in bond, with sufficient and good security, to appear at the next circuit court to be holden for said county, to answer to such charge; to which such court said warrant and bond shall be returned. On neglect or refusal to give such bond and security, the justice or justices shall cause such person to be committed to the jail of the county, there to be held to answer to such complaint." *Gale's Stat.*, 332.

Form of complaint before birth.

State of Illinois, }
La Salle county, } ss. The complaint of A. B., of *Grafton precinct*, in said county, an unmarried woman, made before *John Ritchie*, Esquire, one of the justices of the peace in and

for said county, under oath, who says that she is now pregnant with a child, and that the said child is likely to be born a bastard; and that C. D., of *Grafton precinct*, in the said county, is the father of the said child.

Taken, signed, and sworn, this day of 18 before me, } A. B.

John Ritchie,
Justice of the peace.

Form of complaint after birth.

State of Illinois, }
La Salle county, } ss. The complaint of A. B. of *Grafton precinct*, in said county, an unmarried woman, made before *John Ritchie*, Esquire, one of the justices of the peace in and for said county, under oath, who says that on the day of 18 at *Grafton precinct*, in the county aforesaid, she was delivered of a (*male*) bastard child; and that C. D., of *Grafton precinct*, in the said county, is the father of the said child.

Taken, signed, and sworn, this day of 18 before me, } A. B.

John Ritchie,
Justice of the peace.

Form of a warrant before birth.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to the sheriff or any constable of the said county:

Whereas, A. B. of *Grafton precinct*, in the said county, an unmarried woman, has this day made complaint, under oath, before *John Ritchie*, Esquire, a justice of the peace in and for said county, that she is pregnant with a child which is likely to be born a bastard, and that C. D. is the father of the said child:

We, therefore, command you to arrest the said C. D., and bring him before the said justice to answer unto the said complaint, and to be further dealt with according to law.

Given under the hand and seal of the said justice, the day of 18 *John Ritchie*. [L. S.]

Form of a warrant after birth.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to the sheriff or any constable of the said county:

Whereas, A. B. of *Grafton precinct*, in the said county, an unmarried woman, has this day made complaint, under oath, before *John Ritchie*, Esquire, a justice of the peace in and for said county, that on the day of 18 at *Grafton precinct*, in the county aforesaid, she was delivered of a (*male*) bastard child, and that C. D. is the father of the said child:

We, therefore, command you to arrest the said C. D., and bring him before the said justice to answer unto the said complaint, and to be further dealt with according to law.

Given under the hand and seal of the said justice, the day of 18 *John Ritchie.* [L. S.]

Form of oath or affirmation, upon the examination.

You do swear in the presence of the ever living God, (or "you do solemnly, sincerely, and truly declare and affirm,") that you will true answers make to all such questions as shall be put to you touching the present complaint, now in hearing, against C. D.

Form of bond for appearance at the circuit court.

State of Illinois, }
La Salle county, } ss. Know all men by these presents, that we, C. D., P. Q., and R. S., are held and firmly bound unto the people of the state of Illinois, in the sum of dollars, to be paid to the said people; for which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the day of 18

Whereas, complaint has been made before *John Ritchie*, Esquire, one of the justices of the peace in and for the said county of *La Salle*, by A. B. of *Grafton precinct*, in said county, an unmarried woman, that she is pregnant with a child, which is likely to be born a bastard, (or "that on the day of 18 she was delivered of a (*male*) bastard child,) and that C. D. is the father of the said child, whereupon the said justice issued a warrant, and caused the said C. D. to be brought before him to answer the said complaint, and to be further dealt with according to law; and upon the examination of the said A. B. upon oath, (or "affirmation,") in the presence of the said C. D. touching the said charge, and upon due consideration thereupon had, the said justice was of opinion that sufficient cause appeared, and did adjudge and determine that the said C. D. enter into a bond, with good and sufficient security, to appear at the next circuit court to be held in and for the said county of *La Salle* to answer to such charge.

Now, therefore, the condition of this obligation is such, that if the above bounden C. D. shall appear at the next circuit court to be held in and for the said county of *La Salle*, and answer to the said complaint, and not depart the court without leave, then this obligation to be void, otherwise to remain in force.

C. D. [L. S.]
P Q. [L. S.]
R. S. [L. S.]

Signed, sealed, and delivered, }
in the presence of }
John Ritchie.

Form of commitment on neglecting or refusing to give bond.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to the sheriff or any constable of the said county, and to the keeper of the common jail of the said county:

Whereas, complaint has been made before *John Ritchie*, Esquire, one of the justices of the peace in and for the said county, by A. B. of *Grafton precinct*, in said county, an unmarried woman, that she is pregnant with a child which is likely to be born a bastard, (or "that on the day of 18 she was delivered of a (*male*) bastard child,") and that C. D. is the father of the said child, whereupon the said justice issued a warrant, and caused the said C. D. to be brought before him to answer to the said complaint, and to be further dealt with according to law; and upon the examination of the said A. B., upon oath, (or "affirmation,") in the presence of the said C. D., touching the said charge, and upon due consideration thereupon had, the said justice was of opinion that sufficient cause appeared, and did adjudge and determine that the said C. D. enter into a bond, with good and sufficient security, to appear at the next circuit court to be held in and for the said county of *La Salle*, to answer such charge: and the said C. D. having neglected (or "refused") to give such bond and security,

We, therefore, command you, the said sheriff, or constable, forthwith to convey the said C. D. to the common jail of the said county, and deliver him to the keeper thereof, together with this precept; and you, the said keeper, are hereby required to receive the said C. D. into your custody, in the said jail, there to be held to answer such complaint, until he shall give such bond and security, or until he shall be discharged by due course of law.

Given under the hand and seal of the said justice, the day of 18 *John Ritchie.* [L. S.]

"Sec. 2. The circuit court of such county, at their said next term, shall have full cognizance and jurisdiction of the said charge of bastardy, and shall cause an issue to be made up, whether the person charged as aforesaid, is the real father of the child or not, which issue shall be tried by a jury. Such inquiry shall not be *ex parte*, when the person charged shall appear and deny the charge; but he shall have a right to appear and defend himself by counsel, and controvert, by all legal evidence, the truth of such charge.

"Sec. 3. If at the time of such court, the woman be not delivered, or be unable to attend, the court shall order a recognizance to be taken of the person charged as aforesaid, in such an amount, and with such sureties as the court may deem just, for the appearance of such person at the next court, after the

birth of her child; and should such mother not be able to attend at the next term, after the birth of her child, the recognizance shall be continued until she is able.

"Sec. 4. On the trial of every issue of bastardy, the mother shall be admitted as a competent witness, and her credibility shall be left to the jury. She shall not be admitted as a witness, in case she has been duly convicted of any crime, which would by law disqualify her from being a witness in another case.

"Sec. 5. In case the issue be found against the defendant, or reputed father, or whenever he shall, in open court, have confessed the truth of the accusation against him, he shall be condemned by the judgment of the said court, to pay such sum of money, not exceeding fifty dollars, yearly, for seven years, as in the discretion of the said court may seem just and necessary for the support, maintenance, and education of such child; and shall, moreover, be adjudged to pay all the costs of the prosecution, for which execution shall issue, as in other cases of costs. The said defendant, or reputed father, shall give bond and security for the due and faithful payment of such sum of money, as shall be ordered to be paid by the said court, to be paid by him for the period aforesaid; which shall be made payable quarter yearly to the judge of the court of probate, and his successor in office, for the county in which the prosecution aforesaid was commenced; and the same, when received, shall be laid out and appropriated, from time to time, by the said judge, under his order and direction, for the purposes aforesaid; in case the defendant or reputed father shall refuse or neglect to give such security as may be ordered by the court, he shall be committed to the jail of the county, there to remain until he shall comply with such order, or until otherwise discharged by due course of law: *Provided, always*, That the said reputed father, after giving bond with approved security, to the court of probate in said county, conditioned for the suitable maintenance of any such child, for the term aforesaid, shall be permitted to take charge and have the control of his said child; and from the time of the said father taking charge of such child, or should the mother refuse to surrender the said child, when so demanded by the said father, then, and from thenceforth the said father shall be released and discharged from the payment of all such sum or sums of money as may thereafter become due against the said father, for the support, maintenance, and education of any such child. If the said child should never be born alive, or being born alive, should die at any time, and the fact shall be suggested upon the record of the said court, then the bond aforesaid shall from thenceforth be void. But when a guardian shall be appointed for such bastard, the money arising from such bonds shall be paid over to such guardian.

"Sec. 6. If upon the trial of the issue aforesaid, the jury shall find that the child is not the child of the defendant, or

pretended father, then the judgment of the court shall be that he be discharged. The woman making the complaint shall pay the costs of the prosecution, and judgment shall be entered therefor, and execution may thereupon issue.

"SEC. 7. If the mother of any bastard child, and the reputed father, shall at any time after its birth, intermarry, the said child shall, in all respects, be deemed and held legitimate, and the bond aforesaid be void.

"SEC. 8. No prosecution under this act, shall be brought after two years from the birth of the bastard child: *Provided*, The time any person accused shall be absent from the state, shall not be computed."

CHAPTER VI.

OF CONTEMPTS OF COURT.

1. Of the power to punish for a contempt.
2. Of the mode of proceeding for a contempt.

1. *Of the power to punish for a contempt.*

Every court has power, while in the exercise of its lawful functions, to preserve order, decency, and silence, for, without this power, no tribunal can exist. *Str.*, 408. 6 *John. Rep.*, 507.

If a contempt be committed in the face of a court, as, by rude and contumelious behavior, by obstinacy, perverseness, or prevarication, by breach of the peace, or any wilful disturbance whatever, the judge may order the offender to be instantly apprehended and imprisoned, at his (the judge's) discretion, without any further proof or examination. *Arch. Crim. Pl.*, 367.

From time immemorial, the courts of England, and from the first settlement of this country, the courts here, have claimed and exercised the power to punish contempts in a summary manner. 1 *Wheeler's Crim. Cases*, 523.

It appears that this power, so far from being repugnant to the words or spirit of Art. VIII., Sec. 8, of our constitution, which declares "that no freeman shall be imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or proper-

ty, but by the judgment of his peers or the law of the land," is, on the contrary, a part of that law of the land which is recognized. The 29th article of *Magna Charta*, of which the above section is substantially a copy, has been interpreted, under the term "law of the land," to include the power in courts of judicature to punish for contempts. 4 *Inst.*, 23. 14 *East*, 85. 3 *Wheeler's Crim. Cases*, 5. And, in Burr's case in the circuit court of the United States, reported in 1 *Wheeler's Crim. Cases*, 503., Cranch, Ch. Justice, says, that contempts of court are not crimes within the meaning of the 2d sec. of the III. Art. of the constitution of the United States, and that attachments for contempts are not criminal prosecutions within the meaning of the sixth amendment, so as to entitle the party to a trial by jury; and that the power of punishing contempts in a summary manner, as given by the 17th sec. of the act of 1789 to the courts of the United States, is not unconstitutional.

In Darby's case, the supreme court of Tennessee say, "The power to punish for contempts is no part of the criminal law. If it were, courts which had no criminal jurisdiction could not punish for contempts, as the houses of the legislature, the courts of chancery, and this court. Where the contempt amounts to an indictable offence as well as a contempt of the court, punishment inflicted by the latter is no bar to a prosecution for the former, and *vice versa*. And neither the contemned court, nor the court of criminal jurisdiction, is obliged to suspend proceedings till the other has acted. 9 *Johns.*, 413, 417. *Cowp.*, 829.

"This power itself, from its very nature, must necessarily be independent of all other tribunals. For, if it depends upon another, whether punishment can be inflicted or not, that very dependence defeats and overturns it. The insulted judge must go to law before some other tribunal, with every one whom his decisions offend. He must quit his business in court, and leave the bench, and travel to inferior courts, and give his attendance upon them, neglecting in the mean time the official duties which belong to his office. The inferior judge may not be disposed to discourage the contempt; the proceedings may not be regular or legal; they may in the end be set aside and quashed, by arresting or reversing the judgment, and must be commenced again, and the same difficulties again encountered. No one would be afraid to offend: the delay of punishment, and the numerous chances of escaping it, would disarm the expected punishment of all its terrors. Nor would the insulted court ever think of the attempt to cause the infliction of punishment under so many discouragements. No sooner does he get through one set of controversies, than some other dissatisfied suitor assails him with equal outrage, and involves him in others. He must go again and forever through the same routine of vexation and trouble. With such embar-

rassments to contend with, will he remain upon the bench? He must either quit it, or submit to be directed by men who resort to such means for the attainment of their ends, and become an instrument in their hands for the sake of rest, abandoning his duties and resigning the rights of the people. Without power to repress the efforts of designing men, that shall be directed against him because of an unyielding temper, how will the judge be able to uphold his integrity when interests of the highest magnitude are to be settled by his decisions? When it shall be observed that the most submissive pass unmolested, will not submission at least plead in recommendation of itself? Will it not set before him the perpetual conflicts which he has to maintain in vindication of opinions in which he has no individual interest, and the unceasing calumnies to which he is exposed for the protection of others, who hardly know the cause why he is so worried? If in so many difficulties the judge is not furnished with the means of immediate defence and repression, his authority must fall, and the rights of the people with it. For what rights have they but those which the law gives, by means of the courts it has instituted? and if these cannot support them, the rights themselves are nominal. The authority which courts have to punish for contempts cannot therefore be interfered with in any degree by any other court or judge. If the party be committed, and brought before another judge or tribunal by *habeas corpus*, and it appear on the face of the commitment that he was committed for a contempt, that being a matter not cognizable in any other but the committing court, he will therefore, without further inquiry, be remanded. *Cro. Ch.*, 168. 2 *Bl. Rep.*, 757. *Dyer*, 59, *b*. *Cro. Ch.*, 579. *Ld. Raym.*, 1108. 2 *Bay's Rep.*, 183. 1 *Dall. Rep.*, 319. 5 *Johns.*, 289. 9 *Johns.*, 419. Nor can the sentence be suspended by writ of error. *Bibb's Rep.*, 602. *Johns. case, and the decision of this court at the present term in the case of the State v. Shumate; also*, 14 *East*, 84. 3 *Wils.*, 200. All these conclusions are established by repeated decisions in different ages through a long succession of centuries; and indispensable to the existence of courts of judicature; have never been complained of, or restrained or regulated in any constitution or national instrument produced by the struggles of the people against oppression; but on the contrary, have been considered as a power in support of the courts of judicature; upon which they depended for protection, against the usurpations of prerogative, and therefore been considered as a privilege belonging to the people." 3 *Wheeler's Crim. Cases*, 6. *Breese's Rep.*, 266. 1 *Kent's Com.*, 335.

In the case of Stuart *v.* The People, it is said by our supreme court, that the right to punish for contempt committed in the presence of the circuit courts is recognized by our

statute; and, while it affirms a principle that is inherent in all courts of justice, to defend itself when attacked, as the individual man has a right to do for his own preservation, it may, also, with great propriety be regarded as a limitation upon the power of the courts to punish for any other contempts. In this power would necessarily be included all acts calculated to impede, embarrass, or obstruct the court in the administration of justice. Such acts would be considered as done in the presence of the court. So, rules entered by the court prohibiting the publication of the evidence, or other matters, while the cause is pending and undecided. The limitation of the power to such cases only, is better calculated to strengthen the judiciary and fasten it in the affections and esteem of the people, who have so large a stake in its purity and efficiency, than the enlarging the power to the extent claimed. 3 *Scam. Rep.*, 405.

And it was further held, in the same case, that if a person is proceeded against as for a contempt of court and adjudged to pay a fine when the matter objected against him does not amount to a contempt by the laws of this state, he may be relieved on error.

In Sparks *v.* Martin, *Ventris*, 1, the court of Kings Bench resolved, on the question directly arising in relation to courts not of record, in these words: "They may punish one that resists the process of their court, and may *fine and imprison* for a contempt to their court acted in the face of it, though they are no court of record."

And in Lining *v.* Bentham, 2 *Bay.*, 1, the constitutional court of appeals of South Carolina say, "With regard to the power of a magistrate to commit for insults or contempts offered to him while in the due execution of his office, it is incidental to magisterial authority, and without such power he could never vindicate or support the laws which are entrusted to his management and over which he has jurisdiction: that a magistrate, sitting in judgment touching a matter within his jurisdiction, constituted a court in law, though an inferior one, and he was bound to protect the authority of such court. And one general principal incidental to all courts as well superior as inferior, was a power to commit for contempts, either by word or deed, offered in the presence of the judge and in the face of such court." In the same case, the court further says: "It is clearly laid down in all the books of authority upon this head, that, if any contempt is shown to the authority of a magistrate, or insult offered to his face, while in the execution of his office, he may act as a judge in such case and commit the offender, though he may proceed less summarily, if he please, by indictment. The true rule of distinction seems to be this, that, where contentious words are spoken, or other insult is offered to a justice of the peace, and in his presence, he may commit; but when spoken behind his back,

he ought to proceed by indictment." See, also, 3 *Burn's Justice*, 30. 10 *Johns. Rep.*, 394.

In the case of Moore, plaintiff in error, *v.* Ames, defendant in error, 3 *Caine's Rep.*, 170, which was a suit brought before a justice to recover back a fine of five dollars, imposed by the plaintiff in error upon the defendant in error for a contempt in refusing to be sworn or to answer as a witness in a case tried before him as a justice; it was held by the court, that a justice is not liable to a suit for a judicial act, and the merits of the imposition of the fine cannot be enquired into before another justice. The magistrate, in the first suit, had exclusive jurisdiction to determine when the witness was in contempt, and the judgment which had been rendered against the justice for the amount of the fine, was reversed.

If, pending an examination, the prisonor or any other person insults the magistrate, he may be committed for the obstruction of justice, as this is an indictable offence; and, without this power, no court could exist. Such commitment, however, cannot be to detain the party until he retract or make personal submission for the offence, but must be for a certain time. 6 *Johns. Rep.*, 506–7. 1 *Chit. Crim. Law*, 88.

By sec. 24 of "An act concerning justices of the peace and constables," it is enacted that "Every person who shall appear before a justice of the peace, when acting as such, or who shall be present at any legal proceeding before a justice, shall demean himself in a decent, orderly, and respectful manner; and for failure to do so, such person shall be fined by the said justice for contempt, in any sum not more than five dollars. *Gale's Stat.*, 408.

In the case of Clarke *v.* The People, arising under this act, Smith, Justice, in delivering the opinion of the court, says, "It is not pretended that the magistrate has exceeded his powers in any way, nor that the contempt was not committed in his presence. The power to punish for contempts is an incident to all courts of justice, independent of statutory provisions, and the power to enforce the observance of order, punish for contumacy, by fine or imprisonment, are powers which may not be dispensed with, because they are necessary to the exercise of all others. The distinction, that courts of inferior jurisdiction, not having a general power to fine and imprison for contempt, are restricted to such as are committed in their presence, will not alter the rule in the present case. The exercise of this power, must necessarily rest in the sound discretion of the magistrate, and, as such, is not the subject of review in the circuit court. *Breese's Rep.*, 266.

1. *Of the mode of proceeding to punish for a contempt.*

When a contempt is committed in the presence of the justice, the offender may be instantly apprehended and punished

without any further proof or examination, and the justice should at the time draw up a conviction according to the truth of the case. 4 *Bl. Com.*, 286.

In the case of Lining *v.* Bentham, 2 *Bay*, 1, on the return of a warrant for a breach of the peace, against Duncan, the justice refused to take the bail offered, upon which Lining got into a violent passion, and accused the justice of gross partiality, and abuse of power in his office of magistrate, accompanied with very abusive and disrespectful language to his face, and in the presence of a number of by-standers. The justice drew up a commitment for the contempt and committed Lining to the common jail for his contemptuous behavior. Lining brought an action against the justice, and Duncan was admitted as a witness, and swore that the facts stated in the commitment were untrue, and a verdict was taken for the plaintiff; but the court of appeals set aside the verdict and determined that the commitment drawn up by the justice was conclusive evidence in his favor, and that the justice was not amenable to an action for a judicial act of this nature, but only on an indictment for oppressive or corrupt conduct.

The power of committing for a contempt is exceedingly arbitrary, and should only be exercised in cases where necessity imperiously requires it for the purpose of sustaining the court in the free discharge of its duties. The justice should bear in mind that he is not invested with power for the purpose of vindicating his own character, so much as for ensuring the respect due to the proper administration of the laws, and to the court.

As the proceedings are summary, without the compulsory attendance of witnesses, and trial by jury, and against the rules of the common law, the party ought to have the benefit of purging the contempt by his own oath; and the justice ought to receive as a satisfactory atonement any reasonable apology for the offender's conduct; but if he refuse to, or cannot purge himself of the contempt, or refuse to render any apology, the justice should not hesitate to inflict upon him such punishment as he may deem commensurate to the offence committed.

A conviction should always be drawn up by the justice for his own protection, for this is conclusive evidence in justification of the commitment, should an action be brought against him or the officer acting under it. 2 *Chit. Gen. Pr.*, 196, 229. *Ante* 186, and, though it seems that the warrant of commitment will answer the same purpose, 10 *Johns. Rep.*, 394, yet a conviction is perhaps more efficient evidence for the purpose of justification than a mere warrant of commitment. 2 *Marsh.*, 377.

A justice cannot commit a person, for a contempt of him in his office, by word of mouth, but the commitment must be by warrant in writing. 7 *Taunt.*, 63. 2 *Marsh.*, 377. But he

may order a by-stander to arrest the offender and detain him until he can make out a commitment.

Form of record of conviction.

State of Illinois, }
La Salle county, } ss. Be it remembered, that on this day of instant, during the trial of a cause between A. B., plaintiff, and C. D., defendant, before me, *Jabez Fitch*, Esquire, one of the justices of the peace in and for the county of *La Salle*, at my office in *Ottawa*, in said county, *Isaac Rattler* did, wilfully and contemptuously, accuse me of gross partiality and abuse of power in the office of justice of the peace, in the presence of a number of by-standers, (or "interrupted me while engaged in the trial of the said cause, by making a great noise and disturbance, and being ordered by me to cease, refused so to do, and said that he did not regard me nor my authority," or if for any other cause, set it forth particularly;) and whereas the said *Isaac Rattler* was forthwith called upon by me and required to answer for the said contempt, and show cause why he should not be convicted thereof, but did not make any defence nor show any cause why he should not be convicted, nor make any apology for his said conduct:

Therefore, I, the said justice, do hereby convict the said *Isaac Rattler* of the said contempt, and adjudge and determine that he pay a fine of *five* dollars, and that he be committed to the common jail of said county, until he pay the said fine, or until he shall be discharged by due course of law. In witness whereof I have hereunto set my hand and seal, this day of 18 *Jabez Fitch.* [L. S.]

Form of commitment for a fine.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county, and to the keeper of the common jail of the said county:

Whereas, on this day of 18 while *Jabez Fitch*, Esquire, one of the justices of the peace of the said county, was engaged in the trial of a cause between A. B., plaintiff and C. D., defendant, at his office in *Ottawa*, in the said county, *Isaac Rattler* did, wilfully and contemptuously, [interrupt the proceedings in said cause by making a great disturbance, and being ordered by said justice to cease, refused so to do, and said that he did not regard him, nor his authority.] And whereas, the said *Isaac Rattler* was forthwith called upon by the said justice, and required to answer for the said contempt, and show cause why he should not be convicted

thereof, but did not make any defence, nor show any cause why he should not be convicted, nor make any apology for his said conduct; and whereas, the said justice did, thereupon, convict the said *Isaac Rattler* of the said contempt, and adjudge and determine that he pay a fine of *five* dollars, and that he be committed to the common jail of the said county, until he pay the said fine, or until he be discharged by due course of law:

We, therefore, command you, the said constable, to take the said *Isaac Rattler*, and deliver him to the keeper of the common jail of the said county, together with this warrant; and you, the said keeper, are hereby required to receive him into your custody in the said jail, and him there safely keep until he pay the said fine, or until he shall be discharged by due course of law. Hereof fail not at your peril.

Given under the hand and seal of the said justice, this day of 18 *Jabez Fitch*, [L. S.]

CHAPTER VII.

OF THE ACKNOWLEDGMENT AND PROOFS OF DEEDS AND OTHER INSTRUMENTS.

By section 9 of "An act concerning conveyance of real property," it is provided that "Every deed, grant, bargain, conveyance, mortgage, defeasance, bond, covenant, or other writing of, and concerning any lands, tenements, hereditaments, or real estate, within this state, whereby the same may be affected in law or equity, (may, in order to entitle any of the before enumerated writings to be recorded,) be acknowledged by the party or parties executing the same in proper person, or by his, her, or their lawful attorney, authorized by power in writing for that purpose specially, or proved by one or more of the subscribing witnesses thereto, before one of the judges of the supreme or circuit court of this state, or before one of the clerks of the circuit court, and certified by such clerk, under the seal of the said court, or before one of the justices of the peace of the county where the land intended to be affected or conveyed shall lie; but where the party or parties executing such writing live or be out of this state, the same may be acknowledged before one of the judges of the supreme or district court of the United States or of the

superior courts in any of the United States or territories, or before any clerk of any court of record, in any of the United States or their territories, and certified by such clerk under the seal of the court.

"SEC. 10. All acknowledgments and proofs of any deeds, conveyances or writings made as aforesaid, by persons, being or residing out of the United States at the time of the execution thereof, for the conveyance of any lands in this state taken or made before the mayor or chief officer of any city in the kingdom or government, where the party or parties executing the same may reside or be, and duly certified under the seal of office of the said mayor or principal officer, shall be of like force and validity; and entitle the same to be recorded, as if the same were acknowledged in the manner prescribed in the preceding section of this act." *Gale's Stat.*, 150.

By sec. 1 of "An act to amend" the act aforesaid, passed the 22d of January, 1829, it is provided "That all deeds and conveyances of lands lying within this state, may be acknowledged or proved before either of the following named officers, to wit: any judge or justice of the supreme or district court of the United States; any commissioner to take acknowledgments of deeds; any judge or justice of the supreme, superior, or circuit court, of any of the United States, or their territories; any clerk of a court of record; mayor of a city; or notary public; but when such proof or acknowledgment is made before a clerk, mayor, or notary public, it shall be certified by such officer, under his seal of office. Such proofs and acknowledgments may also be made before any justice of the peace; but if such justice of the peace reside out of this state, there shall be added to the deed a certificate of the proper clerk, setting forth that the person before whom such proof or acknowledgment was made, was a justice of the peace at the time of making the same. If such justice of the peace reside within this state, the certificate of the clerk of the county commissioners' court, of the proper county, under his seal of office, that the person taking such proof, or acknowledgment, was a justice of the peace at the time of taking the same, shall be deemed sufficient evidence of that fact. If such justice reside within the county, where the lands conveyed are situate, no such certificate shall be required. All deeds and conveyances which have been, or may be, acknowledged or proved in the manner prescribed in this section, shall be deemed as good and valid in law, as if the same had been acknowledged or proved in the manner prescribed in the ninth section of the act to which this is an amendment." *Gale's Stat.*, 155.

By "An act relating to the recording or registering of conveyances or other instruments in writing, executed out of this state, and within the United States," it is provided "That all deeds, mortgages, conveyances, powers of attorney, or other

instruments in writing, of, or concerning any lands, or real estate within this state, which have or may hereafter be made and executed without this state, and within the United States, and which may hereafter be acknowledged or proved in conformity with the laws and usage of the state, territory or district, in which any of such conveyances or instruments have been, or shall hereafter be made and executed, shall be recorded or registered in the respective counties in this state, in which the lands, tenements or hereditaments, affected by any such conveyances or instruments, may be situate; and all conveyances or instruments thus acknowledged or proved, are hereby declared effectual and valid in law, to all intents and purposes, as though the same acknowledgments had been taken or proof of execution made, within this state, and in pursuance of the laws thereof; *Provided*, That the clerk of any court of record within such state, territory or district, shall, under his hand and the seal of such court, certify that such instrument is acknowledged or proved in conformity with the laws of the state, territory or district in which it is so acknowledged or proved, and all deeds, mortgages, conveyances, powers of attorney or other instruments in writing, of, or concerning any lands or real estate within this state, which have been heretofore recorded in the respective counties in which the lands or real estate, described in, or affected by such deeds, mortgages, conveyances, powers of attorney, or other instruments in writing, is situate, are hereby enacted and declared to be good and effectual, as notices to subsequent purchasers or mortgagees." *Sess. Laws of* 1841, 66.

By sec. 11 of "An act concerning conveyances of real property," it is further provided that "No judge or other officer shall take the acknowledgment of any person to any deed or instrument of writing as aforesaid, unless the person offering to make such acknowledgment shall be personally known to him to be the real person who, and in whose name such acknowledgment is proposed to be made, or shall be proved to be such, by a credible witness, and the judge or officer taking such acknowledgment shall, in his certificate thereof, state, that such person was personally known to him to be the person whose name is subscribed to such deed or writing, as having executed the same, or that he was proved to be such by a credible witness, (naming him,) and on taking proof of any deed or instrument of writing by the testimony of any subscribing witnesses, the judge or officer shall ascertain, that the person who offers to prove the same, is a subscribing witness, either from his own knowledge, or from the testimony of a credible witness; and if it shall appear from the testimony of such subscribing witness that the person whose name appears subscribed to such deed or writing, is the real person who executed the same, and that the witness subscribed his name as such, in his presence and at his request, the judge or officer

shall grant a certificate, stating that the person testifying as subscribing witness was personally known to him to be the person whose name appears subscribed to such deed as a witness of the execution thereof, or that he was proved to be such by a credible witness, (naming him,) and stating the proof made by him; and where any grantor or person executing such deed or writing and the subscribing witnesses are deceased, or cannot be had, the judge or officer, as aforesaid, may take proof of the hand writing of such deceased party and subscribing witness or witnesses (if any) and the examination of a competent and credible witness, who shall state on oath or affirmation, that he personally knew the person, whose hand writing he is called to prove, and well knew his signature, (stating his means of knowledge,) and that he believes the name of such person subscribed to such deed or writing, as party or witness, (as the case may be,) was thereto subscribed by such person; and when the hand writing of the grantor or person executing such deed or writing, and of one subscribing witness, (if any there be,) shall have been proved as aforesaid, the judge or officer shall grant a certificate thereof, stating the proof aforesaid.

"SEC. 12. It shall and may be lawful for any married woman to release her right of dower, of, in, and to any lands and tenements, whereof her husband may be possessed or seized, by any legal or equitable title during coverture, by joining such husband in the deed or conveyance, for the conveying of such lands and tenements, and appearing and acknowledging the same before any judge or other officer authorized to take acknowledgments by this act; and it shall be the duty of such judge or other officer, if such woman be not personally known to him, to be the person who subscribed such deed or conveyance, to ascertain the same by the testimony, of at least one competent and credible witness; and upon being satisfied of that fact, shall acquaint such woman with the contents of the deed or conveyance, and shall examine her separate and apart from her husband, whether she executed the same, and relinquished her dower to the lands and tenements therein mentioned, voluntarily, freely, and without compulsion of her said husband; and if she acknowledge that she executed the same, and relinquishes her dower in the lands and tenements therein mentioned voluntarily and freely and without the compulsion of her husband, such judge or other officer shall grant a certificate, to be endorsed on, or annexed to such deed, stating that such woman was personally known to him, or was proved by a witness, (naming him,) to be the person who subscribed such deed or writing; and that she was made acquainted with the contents thereof, and was examined, and acknowledged such deed as aforesaid; which, being recorded, together with the deed, duly executed and acknowledged by the husband according to law, shall be sufficient to discharge

and bar the claim of such woman to dower, in the lands and tenements conveyed by such deed or conveyance.

"SEC. 13. When any husband and wife residing in this state, shall wish to convey the real estate of the wife, it shall and may be lawful for the said husband and wife, she being above the age of eighteen years, to execute any grant, bargain, sale, lease, release, feoffment, deed, conveyance, or assurance, in law whatsoever, for the conveying of such lands, tenements, and hereditaments; and if after the executing thereof, such wife shall appear before some judge or other officer, authorized by this act to take acknowledgments, to whom she is known, or proved by a credible witness to be the person who executed such deed or conveyance, such judge or other officer shall make her acquainted with, and explain to her the contents of such deed or conveyance, and examine her separate and apart from her husband, whether she executed the same voluntarily, freely, and without compulsion of her said husband; and if such woman shall, upon such examination, acknowledge such deed or conveyance to be her act and deed, that she executed the same voluntarily and freely, and without compulsion of her husband, and does not wish to retract, the said judge or other officer shall make a certificate endorsed on, or annexed to such deed or conveyance, stating that such woman was personally known to the said judge or other officer, or proved by a witness, (naming him,) to be the person who subscribed such deed or conveyance, and setting forth that the contents were made known and explained to her, and the examination and acknowledgment aforesaid; and such deed, (being acknowledged or proved according to law as to the husband,) shall be as effectual in law as if executed by such woman while sole and unmarried. No covenant or warranty contained in any such deed or conveyance, shall in any manner bind or affect such married woman, or her heirs, further than to convey from her and her heirs effectually, her right and interest expressed to be granted or conveyed in such deed or conveyance.

"SEC. 14. Where any *feme covert*, not residing in this state, being above the age of eighteen years, shall join with her husband, in any deed, mortgage, conveyance or other writing of, or relating to any lands or real estate situated within this state, she shall thereby be barred of, and from all claim of dower, and all other interests, claim, seizin, right, and title therein, in like manner as if she were sole and of full age; and the acknowledgment or proof of such deed, mortgage, conveyance or other writing, may be the same, as if she were sole, and shall entitle such deed, mortgage, conveyance, or other writing, to be recorded, as is authorized by this act."

"SEC. 16. All powers or letters of attorney, or agency, authorizing the granting, selling, conveying, assuring, releasing, or transferring, or for the executing or acknowledging

of any grants, sales, leases, assurances, or other conveyances, or writings whatsoever, concerning any lands and tenements, or whereby the same may be affected in law or equity, shall be acknowledged or proved, and recorded as herein before required in cases of deeds and other assurances, after which, all grants, conveyances, and assurances, made and acknowledged, pursuant to the powers granted, unless the same be revoked by a deed, duly acknowledged and proven, and recorded as aforesaid, shall be as valid and effectual as if executed and acknowledged by the constituent or constituents." *Gale's Stat.*, 152, 153.

By section 5 of "An act abolishing the office of state recorder," passed January 18th, 1833, it is declared "That from and after the first day of August next, all deeds and other title papers, which are required to be recorded, shall take effect, and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice, and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice, until the same shall be filed for record in the county where the said lands may lie." *Gale's Stat.*, 664.

FORMS OF ACKNOWLEDGMENT OF DEEDS, &C.

By grantor known to the justice.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 before me, the subscriber, one of the justices of the peace in and for the said county, appeared A. B., who is personally known to me to be the individual described in, and who executed the within deed, and acknowledged to me that he had executed the same.

John Stadden.

By grantor identified by witness.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 before me, the subscriber, one of the justices of the peace in and for the said county, personally appeared A. B., satisfactorily proved to me to be the individual described in, and who executed the within *deed*, by the oath of E. F., of *Dayton*, in said county, a competent and credible witness, for that purpose by me duly sworn, and acknowledged to me that he had executed the same.

John Stadden.

By husband and wife, of husband's estate, both known to the justice.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 before me, the subscriber, one of the justices of the peace in and for the said county, appeared A. B., and C. D. his wife, to me personally known to be the individuals described in, and who executed the within *deed*; that the said A. B. acknowledged that he had executed the same; and that the said C. D., wife of the said A. B., after having been by me made acquainted with the contents of the said *deed*, on an examination, separate and apart from her said husband, acknowledged that she had executed the same, and relinquished her dower in the lands and tenements therein mentioned voluntarily and freely, and without compulsion of her said husband. *John Stadden.*

By husband and wife, of husband's estate, both identified by a witness.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 before me, the subscriber, one of the justices of the peace in and for the said county, personally appeared A. B., and C. D. his wife, satisfactorily proved to me to be the individuals described in, and who executed, the within *deed*, by the oath of E. F., of *Dayton*, in said county, a competent and credible witness, for that purpose by me duly sworn; that the said A. B. acknowledged that he had executed the same; and that the said C. D., the wife of the said A. B., after having been by me made acquainted with the contents of the said *deed*, on an examination separate and apart from her said husband, acknowledged that she had executed the same, and relinquished her dower in the lands and tenements therein described voluntarily and freely, and without compulsion of her said husband. *John Stadden.*

By husband and wife, of husband's estate, husband known and wife identified.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 before me, the subscriber, one of the justices of the peace in and for the said county, appeared A. B., to me personally known to be one of the individuals described in, and who executed, the within *deed*; and C. D. his wife, satisfactorily proved to me to be one of the individuals described in, and who executed, the within *deed*, by E. F., of *Dayton*, in the said county, a competent and credible witness,

for that purpose by me duly sworn; that the said A. B. acknowledged that he had executed the same; and that the said C. D., the wife of the said A. B., after having been by me made acquainted with the contents of the said deed, on an examination separate and apart from her said husband, acknowledged that she had executed the same and relinquished her dower in the lands and tenements therein described, voluntarily and freely, and without compulsion of her said husband.

John Stadden.

By husband and wife, of the husband's estate, husband identified and wife known to the justice.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 before me, the subscriber, one of the justices of the peace in and for the said county, personally appeared A. B., satisfactorily proved to me to be one of the individuals described in, and who executed, the within *deed*, by the oath of E. F., of *Dayton*, in said county, a competent and credible witness, for that purpose by me duly sworn; and C. D., wife of the said A. B., personally known to me to be one of the individuals described in, and who executed, the within *deed;* that the said A. B. acknowledged that he had executed the same; and that the said C. D., wife of the said A. B., after having been by me made acquainted with the contents of the said *deed*, on an examination separate and apart from her said husband, acknowledged that she had executed the same, and relinqushed her dower in the lands and tenements therein described voluntarily and freely, and without compulsion of her said husband. *John Stadden.*

By husband and wife, of the wife's estate, both known to the justice.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 before me, the subscriber, one of the justices of the peace in and for the said county, appeared A. B., and C. D. his wife, to me personally known to be the individuals described in and who executed the within *deed*; that the said A. B. acknowledged that he had executed the same; and that the said C. D., wife of the said A. B., after I had made her acquainted with and explained to her the contents of the said *deed*, on an examination separate and apart from her said husband, acknowledged said *deed* to be her act and *deed*, and that she executed the same voluntarily and freely, and without compulsion of her said husband; and that she does not wish to retract. *John Stadden.*

By husband and wife, of the wife's estate, both identified by a witness.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 before me, the subscriber, one of the justices of the peace in and for the said county, personally appeared A. B., and C. D. his wife, satisfactorily proved to me to be the individuals described in and who executed the within *deed*, by the oath of E. F., of *Dayton*, in the said county, a competent and credible witness, for that purpose by me duly sworn; that the said A. B. acknowledged that he had executed the same; and that the said C. D., wife of the said A. B., after I had made her acquainted with and explained to her the contents of the said *deed*, on an examination separate and apart from her said husband, acknowledged said *deed* to be her act and *deed*, and that she executed the same voluntarily and freely, and without compulsion of her said husband; and that she does not wish to retract. *John Stadden.*

By husband and wife, of the wife's estate, husband known and wife identified by a witness.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 before me, the subscriber, one of the justices of the peace in and for the said county, appeared A. B., to me personally known to be one of the individuals described in and who executed the within *deed;* and C. D., wife of the said A. B., to me satisfactorily proved to be one of the individuals described in and who executed the within *deed*, by E. F., of *Dayton*, in said county, a competent and credible witness, for that purpose by me duly sworn; that the said A. B. acknowledged that he had executed the same; and that the said C. D., wife of the said A. B., after I had made her acquainted with and explained to her the contents of the said *deed*, on an examination separate and apart from her said husband, acknowledged the said *deed* to be her act and *deed*, and that she executed the same voluntarily and freely, and without compulsion of her said husband; and that she does not wish to retract. *John Stadden.*

By husband and wife, of the wife's estate, husband identified and wife known to the justice.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 before me, the subscriber, one of the justices of the peace in and for the said county, personally appeared A. B., to me satisfactorily proved to be one of the

individuals described in and who executed the within *deed*, by the oath of E. F., of *Dayton*, in the said county, a competent and credible witness, for that purpose by me duly sworn; and C. D., wife of the said A. B., personally known to me to be one of the individuals described in and who executed the within *deed;* that the said A. B. acknowledged to me that he had executed the said *deed;* and that the said C. D., wife of the said A. B., after I had made her acquainted with and explained to her the contents of the said *deed*, on an examination separate and apart from her said husband, acknowledged the said *deed* to be her act and deed, and that she executed the same voluntarily and freely, and without the compulsion of her said husband; and that she does not wish to retract.

John Stadden.

By three persons, two known to the justice and one identified.

State of Illinois, }
La Salle county, } ss. Be it remembered, that on this day of 18 before me, the subscriber, one of the justices of the peace in and for the said county, appeared A. B. and C. D., to me personally known to be two of the individuls described in and who executed the within *deed;* and E. F., to me satisfactorily proved to be one of the individuals described in and who executed the within *deed*, by the oath of G. H., of *Dayton*, in said county, a competent and credible witness, for that purpose by me duly sworn; and the said A. B., C. D., and E. F. severally acknowledged to me that they had executed the same. *John Stadden.*

By an attorney known to the justice.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 before me, the subscriber, one of the justices of the peace in and for the said county, appeared C. D., to me personally known to be the individual described in and who executed the within *deed*, as the act and deed of A. B., therein described as grantor by virtue of a power of attorney duly executed to him by the said A. B., bearing date the day of 18 and recorded in the recorder's office of *La Salle* county, and acknowledged to me that he had executed the said *deed* as the act and deed of the said A. B.

Jnoh Stadden.

By an attorney, identified by a witness.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 before me, the subscriber, one of the

justices of the peace in and for the said county, personally appeared C. D., to me satisfactorily proved to be the individual described in and who executed the within *deed*, as the act and *deed* of A. B., therein described as grantor by virtue of a power of attorney duly executed to him by the said A. B., bearing date the day of 18 and recorded in the recorder's office of *La Salle* county, by the oath of G. H., of *Dayton*, in the said county, a competent and credible witness for that purpose by me duly sworn; and acknowledged that he had executed the said *deed* as the act and deed of the said A. B. *John Stadden.*

FORMS OF PROOF OF DEEDS, &C.

Proof by a subscribing witness known to the justice.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 before me, the subscriber, one of the justices of the peace in and for the said county, appeared E. F., of *Dayton*, in the said county, personally known to me to be the person whose name is subscribed to the within *deed*, as a subscribing witness of the execution thereof; and being duly sworn, deposed and said, that he is personally acquainted with A. B., whose name appears subscribed to said *deed* as grantor, and knows him to be the real person who executed the same; and that he subscribed his name as a witness thereto, in the presence and at the request of the said A. B., which to me is satisfactory proof of the due execution of the said *deed*.
John Stadden.

Proof of deed of the husband's estate, by a subscribing witness as to the husband and acknowledgment by the wife, the wife and witness both known to the justice.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 before me, the subscriber, one of the justices of the peace in and for the said county, appeared E. F., of *Dayton*, in said county, personally known to me to be the person whose name is subscribed to the within *deed* as a subscribing witness of the execution thereof, and being duly sworn, deposed and said, that he is personally acquainted with A. B., whose name appears subscribed to the said *deed* as grantor, and knows him to be the real person who executed the same, and that he subscribed his name as a witness thereto in the presence and at the request of the said A. B., which to me is satisfactory proof of the due execution thereof by the said A. B.; that, at the same time, appeared before me C. D.,

the wife of the said A. B., to me personally known to be one of the persons described in and who executed the within *deed;* and the said C. D., after having been by me made acquainted with the contents of the said *deed*, on an examination separate and apart from her said husband, acknowledged that she had executed the same, and relinquished her dower in the lands and tenements therein described voluntarily and freely, and without compulsion of her said husband. *John Stadden.*

Proof by a subscribing witness, identified by another witness.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 before me, the subscriber, one of the justices of the peace in and for the said county, appeared E. F., of *Dayton*, in the said county, satisfactorily proved to me to be the individual whose name is subscribed to the within *deed* as a subscribing witness of the execution thereof, by the oath of G. H., of *Dayton*, in the said county, a competent and credible witness, for that purpose by me duly sworn; that the said E. F., after being duly sworn, deposed and said, that he is personally acquainted with A. B., whose name appears subscribed to the said *deed* as grantor, and knows him to be the real person who executed the same, and that he subscribed his name as a witness thereto in the presence and at the request of the said A. B., which to me is satisfactory proof of the due execution of the said *deed.* *John Stadden.*

Proof of deed of husband's estate by a subscribing witness, as to husband and acknowledgment by the wife, the witness and wife both identified by another witness.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 before me, the subscriber, one of the justices of the peace of the said county, personally appeared E. F., of *Dayton*, in the said county, and C. D., the wife of A. B., the grantor described in the within *deed;* and it is satisfactorily proved to me that E. F. is the individual whose name is subscribed to the within *deed* as a subscribing witness of the execution thereof; and that C. D., the wife of the said A. B., is one of the individuals described in and who executed the within *deed*, by the oath of G. H., of *Dayton*, in said county, a competent and credible witness, for that purpose by me duly sworn; that the said E. F., after being duly sworn, deposed and said that he is personally acquainted with A. B., whose name appears subscribed to said *deed* as grantor, and knows him to be the real person who executed the same, and that he subscribed his name as a witnesss thereto, in the

presence and at the request of the said A. B., which to me is satisfactory proof of the due execution thereof by the said A. B.; and that the said C. D., wife of the said A. B., after having been by me made acquainted with the contents of the said *deed*, on an examination separate and apart from her said husband, acknowledged that she had executed the same, and relinquished her dower in the lands and tenements therein mentioned voluntarily and freely, and without compulsion of her said husband. *John Stadden.*

Proof where grantor is dead, there being no subscribing witness.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 before me, the subscriber, one of the justices of the peace in and for the said county, personally appeared E. F. of *Dayton*, in the said county, a competent and credible witness, who, being duly sworn and the within *deed* being shown to him, deposed and said, that he personally knew A. B., the grantor described in the within *deed*, and that he is now deceased; that he had frequently seen the said A. B. write, and well knew his signature, and that he believes the name of A. B. subscribed to the said *deed* as a party, was thereto subscribed by the said A. B., which to me is satisfactory proof of the due execution thereof.

John Stadden.

Proof where grantor and subscribing witnesses are all dead.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 before me, the subscriber, one of the justices of the peace in and for the said county, personally appeared E. F. of *Dayton*, in the said county, a competent and credible witness, who, being duly sworn and the within deed shown to him, deposed and said, that he personally knew A. B., the grantor described in the within deed, and that he is now deceased; that he had frequently seen the said A. B. write, and well knew his signature, and that he believes the name of A. B. subscribed to the said deed as a party, was thereto subscribed by the said A. B. And the said E. F. further deposed and said, that he personally knew G. H., whose name is (or "one of the persons whose names are") subscribed to the within deed, as a subscribing witness, and that he is now dead, that he has frequently seen him write and well knew his signature, and that he believes the name of G. H., subscribed to the said deed as a subscribing witness, was thereto subscribed by the said G. H.

(If there is more than one subscribing witness, then state

what follows in brackets, or otherwise, according to the facts.)

[And the said E. F. further deposes and says, that at the time of the date of the said deed he was, and for several years had been, acquainted with one L. M., a miller, who then resided in *Dayton*, in said county; that the said L. M. died about *four* years ago, and since the date of the said deed; that he is not acquainted with the signature of the said L. M., and that he knew of no other person of the name of L. M. in Dayton at that time.] All which is satisfactory proof to me of the due execution of the said deed by the said A. B.

John Stadden.

Form of certificate by county clerk.

State of Illinois, }
La Salle county, } ss. I, *Maurice Murphy*, clerk of the county commissioners' court of the said county, do hereby certify that *John Stadden*, whose name appears signed to the above (or "within") certificate of acknowledgment, (or "proof,") was on the day of 18 when the same was taken, a justice of the peace in and for the said county.

In witness whereof, I have hereunto set my [L. S.] hand and affixed the seal of the said court, this day of 18

Maurice Murphy.

CHAPTER VIII.

OF DISTRESS.

A DISTRESS is the taking of a personal chattel out of the possession of the wrong-doer into the custody of the party injured, to procure satisfaction for the wrong committed. The only cases in which a distress is allowed by law are, 1. For arrears of rent. 2. For beasts trespassing on the lands of another, or, as it is generally expressed, damage feasant. 3. For fines and amercements. 1 *Burn's Justice*, 470. 3 *Bl. Com.*, 6.

Distress for rent will here only be considered.

Rent signifies a compensation or return, it being in the nature of an acknowledgment given for the possession of some

corporeal inheritance. It is defined to be a certain profit issuing yearly out of lands and tenements corporeal. It must be a *profit*, yet there is no occasion for it to be a sum of money; for spurs, capons, horses, corn, cattle, poultry, and other matters may be rendered, and frequently are rendered by way of rent. It may, also, consist in services or manual operations; as, to plough so many acres of ground, to attend the king or the lord to the wars, and the like, which services, in the eye of the law, are profits. This profit must also be *certain*, or that which may be reduced to a certainty by either party. It must also issue *yearly*, though there is no occasion for it to issue every successive year, but it may be reserved every second, third, or fourth year. It must *issue out* of the thing granted, and not be part of the land or thing itself. It must issue out of *lands* and *tenements* corporeal, that is, from some inheritance whereunto the owner or grantee of the rent may have recourse to distrain. 2 *Bl. Com.*, 41. 3 *Cruise's Dig.*, 312.

At common law there are three kinds of rent, namely, rent-service, rent-charge, and rent-seck.

A *rent-service* is so called because it hath some corporeal service incident to it, as, at the least, fealty, or the feudal oath of fidelity. For, if a tenant holds his lands by fealty and certain rent, or by rendering services, as ploughing the land or shearing the sheep, and the like; for these the lord might distrain of common right, without reserving any special power of distress; provided he had in himself the reversion, or future estate of the lands and tenements after the lease or particular estate of the lessee or grantee is expired. 2 *Bl. Com.*, 42. 3 *Scam. Rep.*, 303. 2 *Bac. Ab.*, 341. The right of distress was inseparably incident, as long as the rent was payable to the lord who was entitled to the fealty. To every tenure fealty is incident, so long as the tenure remains. 3 *Cruise's Dig.*, 312.

A *rent-charge* is where the owner of the rent hath no future interest, or reversion expectant in the land; as where a man by deed maketh over to others his whole estate in fee simple with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be in arrear or behind, it shall be lawful to distrain for the same. In this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed. 2 *Bl. Com.*, 42. 6 *Bac., Ab.*, 6. But where a rent was granted out of lands by deed, the grantee had not the power to distrain for it, because there was no fealty annexed to such grant. To remedy this inconvenience, an express power of distress was inserted in the grant, in consequence of which it was called a rent-charge, because the lands were charged with a distress for the recovery of the rent. 3 *Cruise's Dig.*, 313.

A *rent-seck*, or barren rent, is nothing more than a rent reserved by deed, without any covenant or clause reserving the

power of distress, in a case in which the owner of the rent had no future interest or reversion in the land, and for the recovery of which no power is given by the rules of the common law: 3 *Scam. Rep.*, 303. 2 *Bl. Com.*, 42. 3 *Cruise's Dig.*, 314.

The difference between a rent-charge and a rent-seek is, that there is a clause of distress annexed to one, and no such clause to the other; and, therefore, the one is a charge upon the land, but for the other the grantee had formerly no remedy but to charge the person of the grantor in the writ of annuity, or a writ of assize. 3 *Scam. Rep.*, 303. 6 *Coke Rep.*, 56. 6 *Bac. Ab.*, 6.

There are, also, other species of rents, which are comprised in the preceding divisions; yet there are some rents which are known by particular names. Thus the certain established rents of the freeholders and ancient copyholders of manors, are called rents of *assize*. Those of the freeholders are also frequently called *chief-rents;* and both sorts are indifferently denominated *quit-rents*, because thereby the tenant goes quit and free of all other services. 2 *Bl. Com.*, 42. 3 *Cruise's Dig.*, 314.

Rack-rent is only a rent of the full value of the tenement, or near it. 2 *Bl. Com.*, 43. 4 *Cruise's Dig.*, 469.

A *fee-farm rent* is a rent charge issuing out of an estate in fee, of at least one-fourth of the value of the lands, at the time of its reservation; for a grant of lands, reserving so considerable a rent, is indeed only letting lands to farm in fee simple, instead of the usual method for life or years. 2 *Bl. Com.*, 43. 3 *Cruise's Dig.*, 314.

To these three sorts of rents above mentioned, may also be added a rent reserved upon a lease at will, called a rent distrainable of common right. 2 *Bac. Ab.*, 341. And, in action of debt for rent upon a lease at will, the plaintiff must set forth, that the defendant entered and was possessed, and prove it, because the rent is due only by the occupation; but on a lease for years, the rent is due on the contract, and if the lessee never enters, he must pay the rent. 1 *Inst.*, 141. 1 *Salk.*, 209. A man may have a rent by prescription, and prescribe that he and his ancestors have been seized thereof, and used to distrain for it when in arrear, and so persons may make a good title to a rent without any deed. 1 *Inst.*, 144. 6 *Coke Rep.*, 33. And there are rents, but not properly called so, reserved by contract or deed, which creates them with clause of distress without a tenure, against the natural course of law, though such rent is rather a penalty. *Jac. Law Dict.*, *title Rent.* By late statutes in England, the distinctions between the several kinds of rent, in respect to the remedy for recovering them, is now totally abolished; and all persons may have the like remedy, by distress, for rent-seek, rent-assize, and chief-rents, as in case of rents reserved upon lease. 2 *Bl. Com.*, 43. 1 *Inst.*, 144, 213.

The remedy for recovery of rent, by way of distress, seems to have come over to us (England) from the civil law; for anciently, in the feudal law, the not paying attendance on the lord's courts, or not doing the feudal service, was a forfeiture of the estate; but those feudal forfeitures were afterwards turned into distresses, according to the pignorary method of the civil law; that is, the land that is let out to the tenant is hypothecated, or as a pledge in his hands to answer the rent agreed to be paid to the landlord, and the whole profits arising from the land are liable to the lord's seizure, for the payment and satisfaction of it. 2 *Bac. Ab.*, 340.

At the common law, the right to distrain is founded on the right of the landlord to demand fealty, and cannot be supported merely by showing a reversionary interest. 6 *Bac. Ab.*, 4. 2 *Bl. Com.*, 105. To establish the right of distress, without any power in the lease; there always existed a rent due, a reversionary interest in the landlord, and fealty due as incident to the tenure of *free and common socage*. 3 *Cruise's Dig.*, 313. 2 *Bl. Com.*, 79. 3 *Kent's Com.*, 511.

Since the time of the conquest of England by William the Norman, tenure is inseparable from the idea of property in land, according to the theory of the English law. All the land is held by some feudal tenure, and there is no presumption or admission of the existence of allodial lands. 2 *Bl. Com.*, 50, 59, 105.

Tenure is the manner whereby lands or tenements are holden, or the service that the tenant owes to his lord; and there can be no tenure without some service, because the service makes the tenure. 1 *Inst.*, 1, 93.. 1 *Cruise's Dig.*, 24. From the various combinations of services arose the four kinds of lay tenure which subsisted in England till the middle of the seventeenth century.

First. Where the service was free, but uncertain, as military service, that tenure was called the tenure in chivalry, or by knight-service.

Secondly. Where the service was not only free, but also certain, as by fealty only, by rent and fealty, &c., that tenure was called free socage. These were the only free holdings or tenements; the others were villenous or servile; as

Thirdly. Where the service was base in its nature, and uncertain as to time and quantity, the tenure was absolute or pure villenage.

Lastly. Where the service was base in its nature, but reduced to a certainty, this was still villenage, but distinguished from the other by the name of privileged villenage; or it might be still called socage, from the certainty of its services, but degraded by their baseness into the inferior title of villen-socage. 2 *Bl. Com.*, 62.

Successive improvements in the character of the estate, and the condition of the tenant, greatly relieved the nation from

some of the prominent evils of the feudal investiture. But the odious badges of the tenure still existed until the 12th Charles II., when all sorts of tenures held of the king or others, were turned into free and common socage. 2 *Bl. Com.*, 77. 3 *Kent Com.*, 507.

Tenure in socage is where the tenant holds of his lord the tenancy by certain service, for all manner of services, so that the service be not knight service. As where a man holdeth his lands of his lord by fealty and certain rent, for all manner of services; or else, where a man holds his lands by homage, fealty, and certain rent for all manner of services; or where a man holds his lands by homage and fealty for all manner of services; for homage by itself maketh not knight service. Also, a man may hold of his lord by fealty only, and such tenure is tenure in socage. For every tenure which is not tenure in chivalry, is a tenure in socage. 1 *Cruise's Dig.*, 42. 2 *Bl. Com.*, 79.

Socage tenures are of feudal origin, and retain some of the leading properties of feuds. 2 *Bl. Com.*, 86. 3 *Kent Com.*, 509.

All lands in this country granted or patented before the revolution, were held by socage tenure, and seem in theory to have been chargeable with the oath of fealty. 3 *Kent Com.*, 511. By the revolution this tenure was abolished. No superior was recognized, and consequently there was no person to whom fealty and service were due.

In the new states formed and admitted into the union since the organization of the general government, this tenure has never existed, and, in all essential respects, it has ceased to exist in every other state. To require homage, fealty, or service to a superior as a condition of holding lands, is inconsistent with our views of a freeman, and contrary to the policy of our government and laws. Yet, for some few purposes in some of the states, socage tenures are still retained in theory, but they partake of the essential qualities of allodial estates, 3 *Kent Com.*, 514, divested of most of the characteristic features of a tenure. And, in those states where the English law in relation to distress for rent has been adopted, the right depends upon a rent certain, and a reversionary interest.

Allodial lands were those whereof the owner had the complete and absolute property, free from all services to any particular lord. 1 *Cruise's Dig.*, 4. He held of no superior to whom he owed homage, fealty, or military service. 3 *Kent Com.*, 497. 2 *Bl. Com.*, 60, 105.

By sec. 1 of "An act concerning conveyances of real property," passed January 31, 1827, it is enacted "That livery of seizin shall in no case be necessary for the conveyance of real property; but every deed, mortgage, or other conveyance in writing, signed and sealed by the party making the same, the maker or makers being of full age, sound mind, discovert, at large, and not in duress shall be sufficient, without livery

of seizin, for the giving, granting, selling, mortgaging, leasing or otherwise conveying or transferring any lands, tenements, or hereditaments in this state; so as to all intents and purposes, absolutely and fully to vest in every donee, grantee, bargainee, mortgagee, lessee, or purchaser, all such estate or estates as shall be specified in any such deed, mortgage, lease, or other conveyance." *Gale's Stat.*, 148.

And by sec. 1 of "An act concerning conveyances," passed July 21, 1837, it is enacted "That every estate in lands which shall hereafter be granted, conveyed or devised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance if a less estate be not limited by express words, or do not appear to have been granted, conveyed, or devised by construction or operation of law." *Gale's Stat.*, 157.

An estate in fee simple, as now understood in this state, is the entire and absolute interest and property in the land, clear of any qualification or condition. And it is presumed that the difference between a pure allodial estate and an estate in fee simple, which was introduced with feuds into England, does not exist in our laws. From the nature and principles of our institutions, as well as our land system, the tenant cannot bear fealty or homage to his landlord, and consequently cannot hold by the tenure of rent service. 3 *Scam. Rep.*, 304.

But, where the grantor or lessor, by the terms of the deed or lease, reserves to himself a power of distraining for rent, the land is charged with a distress for the payment of it, not of common right, but by virtue of the express contract or agreement of the parties. 6 *Bac. Ab.*, 6. 2 *Bl. Com.*, 42. Rent-charges are of great antiquity, and have been established and confirmed by a series of judicial decisions. 3 *Cruise's Dig.*, 313. Our statutes providing for the sale of property distrained, undoubtedly recognized the right of distraining for this kind of rent. The power of distraining for rent, by the common law, being confined to a rent-service, and our statutes not defining what shall constitute a right to distrain, it became a question whether rent reserved by deed, without containing a clause for that purpose, could be collected by distress, without the sanction and authority of a legislative enactment, expressly conferring the right. Whatever objections might heretofore have existed to the exercise of such a power, they are now obviated by a decision of our supreme court, wherein it is held that a landlord can distrain for rent whether a power for that purpose is contained in the deed or lease, or not.

In the case of Penny *v.* Little *et al.*, 3 *Scam. Rep.*, 301, Douglass, Justice, in delivering the opinion of the court, says, "To constitute rent-charge, it is necessary that the lease should contain a clause reserving the right to distrain for the rent. This is contrary to the universal practice of this country. Probably such a lease cannot be found in the state, yet,

scarcely a day passes that we do not see landlords distraining for rent. It is possible that landlords may have usurped, and daily exercised for twenty years, a summary, and by many supposed to be, an arbitrary and oppressive remedy, for the collection of rents; and that their tenants have quietly and tamely submitted to the usurpation, and that the bar have approved and the courts sustained the same, without conceiving that it was illegal; and such must inevitably be the case, if we are to be confined, in our decisions, strictly within the limits of the common law of England, and the British statutes in aid thereof, prior to the fourth year of James I., and our own statutes." Again, "The inhabitants of this country always claimed the common law as their birth-right, and at an early period established it as the basis of their jurisprudence. Slight changes and modifications were found necessary, and consequently adopted, by common consent, from time to time, to adapt it to our peculiar institutions and the habits and customs of the people. These changes, modifications, and customs having for a long course of years been acquiesced in by the people and sanctioned by the courts, have acquired the force of law and become incorporated into and made part of the common law of the land. The legislation of the territory and of our state, was adopted with reference to the law as it thus existed in the country. Upon this principle and none other can we account for the numerous cases in which the common law has been changed by statute in England since the fourth year of James I., and those changes adopted by the courts in this country without having been first re-enacted by our legislature. In confirmation of this principle, it is sufficient for our present purposes to cite the act of the territorial legislature and the acts of 1819 and 1827 recognizing the right of distress in all cases where the rent is certain, without reference to whether the lease contained a clause reserving the privilege of distraining for rent. We are, therefore, of the opinion that, as the law now stands in this state, a landlord has a right to distrain for rent without reserving the privilege in the lease."

It, therefore, now appears to be settled in this state, that the remedy by distress is extended to the proprietors of what were formerly called rents-seek, as well as to rent-charge.

Rents are most usually reserved on leases, and a tenancy which will authorize a distress for rent need not be created by a formal lease or instrument in writing, but it may be implied from circumstances, and a parol lease will be sufficient. 2 *Cowen Rep.*, 652. 10 *Johns. Rep.*, 92. 1 *Bay Rep.*, 315.

Distress for rent cannot be made before rent falls due; therefore it may not be made on the same day on which the rent becomes due; for, if the rent is paid in any part of that day whilst a man can see to count money, the payment is good. 1 *Burn's Justice*, 471. 1 *Saund.*, 287. And it is said that the

distrainor must wait till after midnight of the day appointed for the payment. *Woodf. Land. & Ten.*, 391. 1 *Saund.*, 237.

A distress for rent cannot be made in the night, but must be made in the day time, that is, after the rising and before the setting of the sun. 3 *Bl. Com.*, 11. 1 *Burn's Justice*, 479. It must not be after tender of payment, for, if the landlord come to distrain the goods of his tenant for rent behind before the distress is levied, the tenant may upon the land tender the arrearages, and if after that a distress be taken, it is wrongful; and if the landlord has distrained, if the tenant, before the impounding thereof, tender the arrearages, the landlord ought to deliver the distress, and if he doth not, the detainer is wrongful, though this would not be the effect of a tender after the distress is actually impounded. 1 *Burn's Justice*, 471. 6 *Cowen Rep.*, 728. 1 *Bing.*, 341.

A tender upon the land demised, whether the rent be payable in money or any other thing, is a good tender, unless another place be pointed out in the lease. 16 *Johns. Rep.*, 222.

It is a general rule, that if no place be appointed for payment or performance, a tender to the person is good, and this too in cases in which a personal tender is not required, as of rent issuing out of land. 8 *Johns. Rep.*, 370. And it seems that a personal tender would be good off the land. 6 *Cowen Rep.*, 728. 1 *Saund.*, 287.

A landlord could not, at the common law, distrain after the term was expired, but was obliged to have recourse to an action of debt to recover the rent, and therefore, if a lease was made for a year, reserving rent payable at the end of the year, the landlord could not distrain for the rent due at the end of the year, because, having no power to distrain until the day after, he was then too late, for the term was expired. And it was the same thing though the lessee held over by sufferance or wrong after the expiration of his term, for he was not in possession in privity of the lease. 2 *Saund.*, 284, *b*, *note* 2. 2 *Wend. Rep.*, 148.

However, though the term for which the land is expressly demised expires, yet if the tenant is entitled by the *custom* of the country to the corn which he has sown on a part of the land, generally called an off-going crop, and to deposit it when reaped on the premises until a certain time, this *custom* is held to amount to an implied agreement between the parties that the relation of landlord and tenant, or, in other words, the term, shall continue as to that part of the premises until the time limited by the *custom* is determined, and consequently the landlord may within that time distrain the corn for rent due at the expiration of the term for which the whole estate was demised. 2 *Saund.*, 284, *c*, *note* 2.

The general rule by the common law is, that all personal chattels upon the premises are liable to the landlord's distress

for rent, unless particularly protected or exempted, whether they be the effects of a tenant or of a stranger; because of the lien which the landlord has on them, in respect of the place where the goods are found and not in respect of the person to whom they belong. *Woodf. Land. & Ten.*, 384–5. 2 *Saund.*, 284, *n.* 2.

By sec. 1 of an act of the legislature of this state, passed January 4, 1831, it is enacted "That in all cases of distress for rent, it shall be lawful for the landlord by himself, his agent, or attorney, to seize for rent any personal property of his tenant that may be found in the county where such tenant shall reside; and in no case shall the property of any other person, although the same may be found on the premises, be liable to seizure for rent due from such tenant: *Provided*, that any crop or crops, growing or having grown on the premises, shall be liable for rent." *Gale's Stat.*, 434.

"Sec. 2. In case of the removal or abandonment of the premises, or any part thereof, by such tenant, all grain or vegetable, grown or growing upon any part of the premises so abandoned, may be seized by the landlord, his agent, or attorney, before the rent is due; and the landlord so distraining, shall cause the grain or vegetables so growing, to be properly cultivated until perfected, and in all cases husband such grain or vegetables, grown and growing, until the rent agreed upon shall become due, when it shall be lawful for such landlord, his agent or attorney, to sell and dispose of the same as in other cases of seizure, after the rent shall have become due, and also to retain a just compensation for his care, culture, and husbanding of such grain or vegetables: *Provided*, that such tenant may at any time redeem the property so taken before the rent is due, by tendering the rent agreed upon, and all reasonable expenses attending the same for care, cultivation, and husbandry, as aforesaid, or replevy the same, as in case of seizure, where the rent is due."

There are, however, certain things particularly protected or exempted, which cannot be distrained for rent. And there are some things which by the common law are temporarily exempted, and others which are exempted as long as sufficient other property can be found to satisfy the rent. It is apprehended that neither our statute authorizing the seizure of any property of the tenant found in the county, nor the statute exempting certain articles from execution, attachment, or distress for rent, was intended to impair the rule protecting beasts of the plough, utensils of trade, &c., from distress, while there is sufficient other property out of which the landlord could make his rent. It is not expressly done away, and for the purpose of carrying the statutes into effect, there does not appear any necessary intendment that it should be. The intention of this statute recognizing the common law rule, that all the personal property of the tenant is liable to the land-

lord's distress for rent, it seems is for the purpose of extending the right of the landlord to seize for rent any personal property of his tenant that may be found in the county where such tenant shall reside. And the statute exempting certain articles and amount of property from levy and sale after these have been set apart to be retained by the tenant, leaves the landlord to pursue his remedy according to the rules of law as known and established.

At common law. Those things in which a man cannot have an absolute or valuable property, are not distrainable, as dogs, cats, rabbits, and all animals naturally wild. Yet, if deer are kept in a private enclosure for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandize, that they may be distrained for rent. 3 *Bl. Com.*, 7.

Whatever is in the personal use or occupation of a man or of his servant is also privileged for the time, and protected from any distress; as an axe with which a man is cutting wood, or a horse while a man is riding him, or a loom in the use of his apprentice, and the like. *Woodf. Land. & Ten.*, 334–5. 3 *Bl. Com.*, 8. And the reason is that, were the rule otherwise, it would perpetually lead to a breach of the peace. 6 *Term. Rep.*, 138.

But horses drawing a cart, may, cart and all, be distrained for rent arrear. 3 *Bl. Com.*, 8. Yet it has been held that horses joined to a cart with a man upon it, cannot be distrained for rent. 1 *Burn's Justice*, 474. 1 *Vent.*, 36.

There are, also, other things privileged by the ancient common law, as a man's tools and utensils of his trade, the axe of a carpenter, the books of a scholar, the materials for making cloth in a weaver's shop, for these the law protects under a presumption that without them the tenant could neither be useful to others, nor gain a livelihood for himself. 2 *Bac. Ab.*, 343. 3 *Bl. Com.*, 9. But utensils and implements of trade may be distrained when they are not in actual use, and where there is not sufficient property besides upon the premises to satisfy the demand of the landlord. 4 *Term Rep.*, 565. And it has been held that the cart of a husbandman may be distrained though an implement of his occupation. 2 *Bac. Ab.*, 344. Beasts of the plough, and any thing belonging to it, and sheep are privileged from distress at common law, while there are other goods or beasts which may be distrained. 2 *Bac. Ab.*, 345. 2 *Bl. Com.*, 9.

Things fixed to the freehold, or part of the freehold, thus furnaces, cauldrons, or other things fixed to the freehold, or the doors or windows of a house, or the like, cannot be distrained. 2 *Bac. Ab.*, 343. So a smith's anvil, on which he works, which is accounted a part of the forge, though it be not actually fixed by nails to the shop, is not distrainable, and so a mill-stone is not distrainable, though it be removed out of

its proper place in order to be picked, because such removal is of necessity, and the stone still continues to be part of the mill. *Woodf. Land. & Ten.*, 389.

Goods in the custody of the law are not distrainable for rent, for it is *ex vi termini* repugnant that it should be lawful to take goods out of the custody of the law; and that cannot be a pledge to me which I cannot reduce into my actual possession. Therefore, goods distrained for *damage feasant* cannot be taken for rent, nor goods in a constable's hands under an execution, nor goods seized by process at the suit of the people, or taken under attachment. *Woodf. Land. & Ten.*, 389.

By Statute. By sec. 1 of "An act to exempt certain articles from execution," it is enacted "That the wearing apparel of each and every person shall be exempt from levy or sale on execution, writ of attachment, or distress for rent.

"SEC. 2. That the following property, when owned by any person being the head of a family and residing with the same, shall be exempt from levy and sale on any execution, writ of attachment, or distress for rent; and such articles of property shall continue so exempt while the family of such person, or any of them, are removing from one place of residence to another in this state, viz: first, necessary beds, bedsteads and bedding, the necessary utensils for cooking, necessary household furniture, not exceeding in value fifteen dollars, one pair of cards, two spinning wheels, one weaving loom and appendage, one stove and the necessary pipe therefor; *Provided*, the same shall be in use, or put up for ready use, in any house occupied by such family. Second, one milch cow and calf, two sheep for each member of the family, and the fleeces taken from the same, or the fleeces of two sheep for each member of a family which may have been purchased by any debtor not owning sheep, and the yarn and cloth that may be manufactured from the same, and sixty dollars worth of property, suited to his or her condition, or occupation in life, to be selected by the debtor. Third, necessary provisions and fuel for the use of the family for three months, and necessary food for the stock hereinbefore exempted from sale, or that may be held under the provisions of this act; *Provided*, that any person, being the head of a family and residing with it, who shall be taken before a probate justice of the peace on a ca. sa. and shall take the benefit of the insolvent laws of this state, shall be allowed the same amount of property exempt from the provisions of said act as is provided for by the provisions of this act; and it shall be the duty of said probate justice of the peace to set apart to such person the same amount and kind of property as is or may hereafter be exempt from execution.

"SEC. 3. If any officer, by virtue of any execution or other process, or any other person, by any right of distress, shall take or seize any of the articles of property hereinbefore

exempted from levy and sale, such officer or person shall be liable to the party injured for three times the value of the property illegally taken or seized, to be recovered by action of trespass, with costs of suit.

"SEC. 4. For the purpose of recovering the damages provided for in the third section of this act, justices of the peace shall have jurisdiction to the amount of one hundred dollars.

"SEC. 5. All laws exempting property from execution, and all acts and parts of acts coming in conflict with the provisions of this act, be and the same are hereby repealed. This act to take effect from and after its passage; *Provided*, should any disagreement arise between any officer and defendant in execution, about and concerning the value of any species of property allowed by this act, it shall be the duty of said officer forthwith to summon two disinterested householders, who, after being duly sworn by some justice of the peace, shall proceed to appraise such property as said defendant may select.

"SEC. 6. Nothing in this act shall be so construed as to prevent landlords from holding a lien on the crop growing or grown on land for rent due for the same."

Where a man is entitled to distrain for an entire duty or sum, he ought to distrain for the whole at once, and not for part at one time and part at another. 3 *Bl. Com.*, 11. 2 *Bac. Ab.*, 352. But if he distrains for the whole and there is not sufficient on the premises, or he happens to mistake in the value of the thing distrained, and so takes an insufficient distress, he may take a second distress to complete the remedy. 2 *Bl. Com.*, 12. *Woodf. Land. & Ten.*, 395.

A distress cannot be made for the interest due upon rent, but only for the principal sum, and if such interest be collected by distress, the party distrained upon may recover back the excess in an action on the case. 6 *Johns. Rep.*, 43.

The landlord may distrain for all the arrears of rent arising during the tenancy, though the rent of several years should happen to be in arrear. 3 *Kent Com.*, 433. 5 *Cowen Rep.*, 501.

It is well settled that an executor cannot distrain for rent accruing after the death of the testator who was seized in fee, because it goes to the heir. 5 *Cowen Rep.*, 501. If the lessor die on the day on which the rent is payable, after sunset, and before midnight, the heir and not the executor may demand the rent, for it is not in strictness due till the last minute of the natural day, although it may be more convenient to pay it before. *Toller's Law of Ex.*, 177. 1 *Saund.*, 287.

Where there are separate demises, there ought to be separate distresses on the several premises subject to the distinct rents, no distress on one part can be good for both rents. But it would be otherwise with regard to separate premises under the same demise, though they lie in different counties, in which case a distress may be taken in either county for the whole rent; and a chasing of the distress from one county to the

other would be a continuance of the taking, though this would not be legal where the counties do not join. *Woodf. Land. & Ten.*, 393—6.

But, as our statutes require the distress warrant to be executed by a sheriff or constable, it would seem that they can only levy it in the county for which they are elected.

When the distress is taken, the next consideration is the disposal of it. For which purpose, the things distrained must, in the first place, be carried to some pound and there impounded by the taker. But in the way thither they may be reserved by the owner, in case the distress was taken without cause, or contrary to law. But if they be once impounded, even though taken without any cause, the owner may not break the pound and take them out, for they are then in the custody of the law. 3 *Bl. Com.*, 12.

A pound signifies any enclosure, and it is either *pound-overt*, that is, open overhead, and is either a common or public pound, or a private pound, where the owner of the beasts impounded may come to feed them without trespass to any other; or it is a *pound-covert*, or close, where the owner cannot come for the purpose aforesaid, as a house. 2 *Bac. Ab.*, 348. 3 *Bl. Com.*, 12.

When cattle are kept in a public pound no notice is necessary to the owner to feed them; he must take notice of it at his peril. But if they are put into a private pound or close of him that distrains, or of a stranger, it is otherwise; notice must then be given to the owner. 1 *Inst.*, 47.

Beasts, it is said, ought to be put into a public pound, for, if they are placed in a private pound, the distrainor must keep them at his peril with provision, (unless notice is given,) for which he shall have no satisfaction, and if they die for want of sustenance, the distrainor shall answer for them. 2 *Bac. Ab.*, 348. *Woodf. Land. & Ten.*, 397. But if they are put in a pound-covert, as a stable, or the like, the landlord or distrainor must feed and sustain them. 3 *Bl. Com.*, 13.

Dead chattels, however, as household goods, &c., which may receive damage by the weather, must be put into a pound-covert, otherwise the distrainor is answerable for them, if they be damaged or stolen away. 3 *Bl. Com.*, 13. 1 *Burn's Justice*, 491.

The distrainor cannot work, or otherwise use the things distrained, as to work a horse, &c., for he hath no property therein, but a bare power by act of law to take it. 2 *Bac. Ab.*, 348.

It is said that if a man takes cows for a distress, he cannot milk them. There is a *dictum* in *Cro. Jac.*, 148, saying that milch kine may be milked by the distrainor, because it is for their preservation, and consequently of benefit to the owner, and Mr. Woodfall inclines to think that this *dictum* would be recognized as law at this time. *Woodf. Land. & Ten.*, 398.

This opinion may be correct in a case where the owner neglects the cows, and they would be damaged unless milked by the distrainor.

The distrainor cannot tie or bind a beast in the pound, though it be to prevent his escape; and if he ties a horse to a post in the pound by reason whereof the horse strangles himself, the owner may have an action of trespass. 2 *Bac. Ab.*, 348.

But if cattle die in the pound without any fault of the distrainor, he may distrain again, or have an action for the rent. 1 *Salk.*, 248.

By the common law, if a man break the pound, or the lock of it, or part of it, he greatly offendeth against the peace, and commits a trespass against the king, and to the party in delay of justice, and therefore hue and cry is to be levied against him, as against those who break the peace, and the party who distrained may again take the goods wheresoever he may find them, and again impound them. 1 *Inst.*, 47. 1 *Burn's Justice*, 492.

When a man hath taken a distress, and the cattle distrained go into the stable or house of the owner, as he is driving them to the pound, if he that took the distress demand them of the owner and he deliver them not, this is a *rescous* in law. 1 *Inst.*, 161.

At the common law, a distress for rent was in the nature of a pledge, or security, to compel the performance of satisfaction, and the landlord had no power to sell or dispose of it; and it often proved of little or no benefit towards hastening the payment of the rent. 2 *Bac. Ab.*, 349. 3 *Bl. Com.*, 13.

If the tenant was disposed to controvert the legality of the distress, either by denying any rent to be due, or by averring it to be paid, the law provided him with a remedy by the writ of replevin, which was a writ authorizing the sheriff to take back the pledge and deliver it to the tenant, on receiving security from him to prosecute the writ to effect, and to return the chattels taken if he should fail in his suit. 3 *Kent Com.*, 476.

But the policy of the law respecting distresses for rent, has been changed. It was inconvenient, if not absurd, that property should be kept in an inactive state, in order to compel a man to perform his stipulated payment. And it seems to have been the design of our legislature to make the remedy by distress nothing more than a summary mode of seizing and selling the tenant's property to satisfy the rent which he owes.

By sec. 6 of "An act concerning landlords and tenants," it is enacted that "When any goods or chattels shall be distrained for rent, and the tenant or owner of the goods so distrained, shall not within five days after such distress taken, and notice thereof, and the cause of taking, replevy the same, with sufficient security according to law; the person distraining or his

agent duly authorized, may, with the sheriff or constable of the county, cause the goods and chattels so distrained, to be appraised, by two reputable freeholders, under oath; which oath may be administered by such sheriff or constable, to appraise said goods and chattels, according to their best judgment and understanding; the person making such distress on giving ten days notice, may sell such goods and chattels at public auction, and after retaining the amount of rent distrained for, and the costs of distress and sale, shall pay the overplus, if any there be, to such tenant or tenants." *Gale's Stat.*, 436.

By sec. 3 of the act of February 26, 1841, it is enacted that "In all cases where distress shall be made for rent, before any sale shall be made of the property distrained, it shall be the duty of the party distraining to have the defendant summoned before the circuit court or justice of the peace, and then and there to prove his demand as in other cases. Justices of the peace shall have jurisdiction in cases under this act to the amount of one hundred dollars; and in case the defendant shall have absconded or removed from the state, then notice shall be given before justices of the peace or the circuit court, as in cases of attachment." *Sess. Laws*, 1841, *p.* 171.

By the statute of 1827, it appears that the property distrained may be held by the landlord five days, as a pledge for the payment of the rent due from the tenant, unless he sooner pays the rent or replevies the property; and it is apprehended that the act of 1841 does not alter the rule as to the time the property shall remain as a pledge. By the last act, the manner in which it may be determined whether there is any rent due, or what amount may be due, in case of disagreement and tender by the tenant, is essentially changed; now, instead of the tenant's being compelled to resort to his writ of replevin, the landlord, in all cases, must summon the tenant before a court having jurisdiction of the amount, and there prove his demand. The tenant, however, is not deprived of his right to pay the rent within the five days before being summoned, consequently the summons should not be issued before the expiration of the five days. When the amount of rent due to the landlord is ascertained and determined by the court, the landlord is then to proceed and cause the property to be appraised and sold, pursuant to the statute.

The evident intention of the act of 1841, was to compel the landlord, after he had seized his tenant's property, to resort to a court of law, so that it may be judicially determined whether there is any, and how much, rent due to him, before selling the property. The effect of this act is still to leave the property distrained in the hands of the landlord until the determination of the proceedings in the court, and, in many cases, it must operate oppressively on the tenant without affording the landlord an adequate remedy. To render this

summary remedy useful, some further legislation is necessary. (1)

If it is deemed essential, in order to protect the tenant against the unfounded or exorbitant demands of his landlord for rent, that the amount shall be judicially ascertained before the sale of the property distrained, it would seem that the object would be better accomplished by abolishing the whole law relative to distresses for rent, and substituting the attachment law.

FORMS OF PROCEEDINGS IN CASES OF DISTRESS FOR RENT.

Warrant of distress.

State of Illinois, }
La Salle county, } ss. To the sheriff or to any constable of the said county:

Distrain the goods and chattels of C. D., which are liable to be distrained, wherever they may be found in the county of *La Salle*, where the said C. D. resides, for the sum of *twenty-five* dollars, being one quarter's (or "one year's") rent due to me on the day of 18 for the premises now in his possession, demised to him by me, and situated in said county. Dated the day of 18 *John Smith.*

Form of inventory.

An inventory of the several goods and chattels of C. D., distrained by me, *Thomas Clark*, constable, on the day of 18 in the county of *La Salle*, where the said C. D. resides, by virtue of the warrant and authority, and in behalf of *John Smith*, the landlord, for the sum of *twenty-five* dollars, being one quarter's (or "one year's") rent due to the said landlord on the day of 18 for the premises in the warrant mentioned, to wit:

Two tables, six chairs, &c.
One cow, two mules, one wagon, &c.

Form of notice to the tenant.

Mr. C. D.,

Take notice, that I have distrained the several goods and chattels specified in the above inventory, for the

(1) In Indiana the landlord cannot distrain in person, or by his bailiff, but he must go before a justice of the peace, and upon oath obtain a warrant to a constable to make the distress, and if the tenant replevies the goods, he gives bond to prosecute the landlord and not the officer. Harris *v.* M'Faddin. 2. *Blackf. Rep.*, 70.

It is provided by statute, in New York, that no officer shall proceed to make distress for rent, unless there be annexed to, or delivered with, the warrant of distress, an affidavit made by the landlord for whose benefit the distress is to be made, or by his agent or receiver, before some officer authorized to administer oaths, specifying the amount of rent due, and the time for which it accrued. 2 *R. S.*, 501.

sum of *twenty-five* dollars, being one quarter's (or as the case is) rent, due to *John Smith*, your landlord, on the day of 18 for said premises. (If the beasts are impounded in a private pound, then say,) "And the beasts therein mentioned are impounded in the private pound, or enclosure, of R. S., near his house, in said county;" and that, unless you pay the said rent, with the costs of distraining for the same, within five days from the service hereof, after the landlord's demand shall be proved, pursuant to the statute, the said goods and chattels will be appraised and sold according to law. Given under my hand at in the county of *La Salle*, the day of 18

Thomas Clark, Constable.

The statute requiring the landlord, after he has distrained, to have the defendant summoned before a justice of the peace, and then and there to prove his demand as in other cases, seems to contemplate that the same proceedings should substantially be had in these cases as in cases arising under the statute conferring civil jurisdiction upon justices of the peace.

Form of summons.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of said county, greeting:

Whereas, A. B. has lately distrained the goods and chattels of C. D., for the sum of dollars, claimed to be due to him for the rent of certain premises leased to the said C. D.:

We, therefore, command you to summon the said C. D. to appear before *William T. Bayley*, Esquire, one of the justices of the peace of the said county, at his office in *Ottawa*, in the said county, on the day of 18 at o'clock in the noon, to answer to the said A. B. in a plea of debt, (or "trespass on the case on promises,") to his damage one hundred dollars; and do you make return hereof as the law directs. Given under the hand and seal of the said justice, the day of 18 *William T. Bayley*. [L. S.]

After the rent shall have been proved, and it shall remain unpaid, and the goods distrained shall not be replevied according to law, the landlord then applies to the sheriff or constable and procures the goods and chattels to be appraised by two sworn appraisers.

Form of oath to be administered to the appraisers.

You, and each of you, do swear in the presence of the ever living God, that you will well and truly appraise the goods

and chattels mentioned in this inventory, (holding it in his hand,) according to your best judgment and understanding.

Form of affirmation.

You, and each of you, do solemnly, sincerely, and truly declare and affirm, that you will (as in the preceding form.)

The sheriff or constable will then endorse on the inventory the following memorandum:

Memorandum. That on the day of 18 L. M. and J. N., appraisers, were severally sworn (or "affirmed") by the subscriber, a constable of the county of *La Salle*, well and truly to appraise the goods and chattels mentioned in this inventory, according to their best judgment and understanding. As witness my hand. *Thomas Clark*, Constable.

After the appraisers have valued the goods, continue the endorsement on the inventory as follows:

Form of the appraisement to be endorsed on the inventory.

We, the above named L. M. and J. N., being duly sworn (or "affirmed") by *Thomas Clark*, the constable above named, well and truly to appraise the goods and chattels mentioned in this inventory, according to our best judgment and understanding, and having viewed the goods and chattels, do appraise and value the same at the sum of dollars and cents. As witness our hands the day of 18

L. M. }
J. N. } Appraisers.

Form of notice of sale.

Notice is hereby given, that on the day of 18 at o'clock in the noon, at the house of C. D., in the town of *Ottawa*, in the county of *La Salle*, in pursuance of the statute in such case made and provided, I shall expose to sale at public auction, two tables, six chairs, one cow, two mules, and one wagon, of the goods and chattels of C. D., distrained for rent due to *John Smith*. Dated this day of 18 *Thomas Clark*, Constable.

CHAPTER IX.

ELECTIONS.

1. Of contesting an election by a candidate for senator or representative.
2. Of contesting an election by a candidate for sheriff, coroner, county commissioner, justice of the peace, or constable.

1. *Of contesting an election by a candidate for a senator, &c.*

By sec. 21 of "An act regulating elections," it is enacted that "If a candidate of the proper county shall desire to contest the validity of any election, or the right of any person declared duly elected to hold his seat in the senate or house of representatives of the general assembly, such candidate shall give notice of his intention in writing to the person whose election he intends to contest, or leave a notice thereof at his usual place of residence, within thirty days after the day of election, expressing the points on which the same will be contested, the name of one of the justices of peace who will attend at the taking of the depositions, the place where, and the time when the said depositions will be taken; which time so fixed upon for the taking of the depositions, shall not exceed sixty days from the day of election; and the party whose election is contested shall have a right to select another justice of the peace, and the two justices so selected shall make choice of a third justice, and if they fail to agree upon a third justice to act with them, they shall proceed to select, by lot, a justice of the peace, who shall preside with them at the taking of such testimony; and the three justices thus selected, or a majority of them, shall have power, and they are hereby authorized to issue subpœnas to all persons whose testimony may be required by either of the parties, commanding such person or persons to appear and give testimony, at the time and place therein mentioned, under the penalty of fifty dollars, to be levied on each and every delinquent who has been duly served with process: *Provided, however*, That should the person whose election is contested, fail to nominate a justice as aforesaid, it shall be the duty of the justice nominated by the person contesting the election as aforesaid, to select a justice of the peace, who shall proceed as above stated. And if any witness or witnesses, summoned as aforesaid, shall fail or refuse to appear at the time specified in said notice, it shall be lawful for said justices, or either of them, to issue an attachment against such witness or witnesses, and the testimony of him, her, or them, so failing or refusing to appear, may be

taken at any time before the next session of the legislature thereafter, by giving five days notice to the party whose election is so contested, and to the party contesting the same; and if any justice of the peace selected as aforesaid to attend at the taking of the depositions shall, without reasonable excuse, fail or refuse to attend at the time and place appointed, after having undertaken to attend, he shall forfeit and pay a fine of fifty dollars, to be recovered by action of debt, in any court having cognizance thereof, one half to the county, and the other half to the person who will sue for the same. And the said justices, when met, shall hear, and certify under seal, all testimony relative to the said contested election to the speaker of the senate, or to the speaker of the house of representatives, as the case may require. And no testimony shall be heard by the said justices, on the part of the person contesting the election, which does not relate to the points specified in the notice, a copy of which notice, attested by the person who served or delivered the same, shall be delivered to the said justices, and by them transmitted, with the other documents, to the speaker of the senate, or to the speaker of the house of representatives, to whichever body the person whose election is contested belongs." *Gale's Stat.*, 267.

Form of notice of intention of contesting the validity of an election.

SIR:

You will please take notice that, as a candidate for the office of representative, I intend to contest your right to hold your seat in the house of representatives of the general assembly of the state of Illinois, from the representative district composed of the counties of *La Salle*, *Grundy*, and that portion of *Kendall* which formerly belonged to the county of La Salle, and that the following are the points upon which your election will be contested, to wit:

First. That, at the last general election, A. B., C. D., E. F., &c., who were minors, and had not attained the age of twenty-one years, (or "neither of whom resided in this said district at the time of the said election," or "neither of whom had resided in this state six months next preceding said election,") appeared before the judges of election in *Ottawa precinct* to vote, and mentioned to the judges the name of *John Jones* as the person they intended to vote for to fill the office of *representative* from the said district, and the clerks of the election in said precinct did then and there enter the names and votes of the said A. B., C. D., E. F., &c., accordingly.

Secondly. That, at the last general election, held on the day of last, the judges of election in *Ottawa precinct*, in *La Salle* county, closed the polls at *four* o'clock in the afternoon, before all the legal voters in the said precinct had voted, and that a number of voters came to the place of

holding the election in the said precinct, before the hour of six o'clock in the afternoon of that day, and offered to vote for representatives for said district, and requested the said judges to cause their names and votes to be entered on the poll books by the clerks of the election, which they refused to do.

And that *Jabez Fitch*, Esquire, one of the justices of the peace of the county of *La Salle*, will attend at the taking of the depositions of witnesses relative to the above specifications, on the day of *instant*, at *ten* o'clock in the *forenoon*, at the house of in the said county, and from day to day, if necessary, in pursuance of the statute in such case made and provided. Dated this day of 18

Yours, &c. *David Smith.*

To Mr. *John Jones.*

Form of affidavit of service.

State of Illinois, }
La Salle county, } ss. E. M., of *Ottawa*, in the said county, being duly sworn, says, that on the day of 18 he personally served upon *John Jones*, of said county, a notice, of which the within (or "annexed") is a copy, by delivering the same to him, (or "he left a notice at the usual place of residence of *John Jones*, with his son, apparently of the age of *fifteen* years, of which the within is a copy.")

Sworn and subscribed before me } E. M.
the day of 18 }

Jabez Fitch,
Justice of the peace.

Form of selection of another justice by the person whose election is contested.

William T. Bayley, Esquire:

SIR: I have received a notice from *David Smith*, a candidate at the last election for the office of representative, that he intends to contest my right to hold my seat in the house of representatives of the general assembly, as one of the representatives of the district composed of the counties of *La Salle*, *Grundy*, and that part of *Kendall* which formerly belonged to the county of *La Salle*, and that *Jabez Fitch*, Esquire, a justice of the peace of *La Salle* county, will attend at the taking of the depositions of witnesses relative to the specifications contained in said notice, on the day of *instant*, at *ten* o'clock in the forenoon, at the house of in the said county, and from day to day, if necessary. Therefore I do hereby select you, being one of the justices of the peace of *La Salle* county, to attend at the taking of the depositions at the time and place abovementioned, in pursuance of the

statute in such case made and provided. Dated this day of 18 Yours, &c. *John Jones.*

The statute does not require this selection, nor the following choice of a third justice, to be in writing, yet it is advisable they should be, and that copies be retained, as it may afterwards become necessary to prove their contents.

Form of choice of a third justice.

We, the subscribers, two of the justices of the peace of *La Salle* county, having been named and selected to attend at the taking of the depositions of witnesses, on the day of *instant*, at *ten* o clock in the *forenoon*, at the house of in the county of *La Salle*, and to continue from day to day, if necessary, relative to the points specified in the notice of *David Smith*, a candidate at the last general election for the office of representative in the general assembly, served upon *John Jones*, upon which he intends to contest the right of the said *John Jones* to hold his seat in the house of representatives of the next general assembly, as one of the representatives of the counties of *La Salle*, *Grundy*, and that part of *Kendall* which formerly belonged to the county of *La Salle*, do hereby make choice of *Seth B. Farwell*, Esquire, one of the justices of the peace of the county of *La Salle*, to attend with us at the taking of the said depositions at the time and place above mentioned, in pursuance of the statute in such case made and provided. Dated the day of 18 *Jabez Fitch*,
William T. Bayley.

Form of subpœna.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to G. H., I. J., K. L., and M. N.:

We command and require you, and each of you, personally to be and appear before *Jabez Fitch*, *William T. Bayley*, and *Seth B. Farwell*, Esquires, three of the justices of the peace in and for the said county, on the day of *instant*, at *ten* o'clock in the *forenoon*, at the house of in the said county, to testify the truth according to your knowledge, touching the matters relative to contesting the right of *John Jones* to hold his seat in the house of representatives of the general assembly, by *David Smith*, on the part of the said *David Smith*, (or "on the part of the said *John Jones*,) and this you, or either of you, are not to omit under the penalty of fifty dollars. Witness, the hands and seals of the said justices, the day of 18 *Jabez Fitch*, [L. S.]
William T. Bayley, [L. S.]
Seth B. Farwell. [L. S.]

Form of attachment against witness.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county:

We command you to attach E. F., and bring him before *Jabez Fitch*, *William T. Bayley*, and *Seth B. Farwell*, Esquires, three of the justices of the peace in and for the said county, at the house of in said county, forthwith, (or "on the day of *instant*, at o'clock in the noon,") to testify the truth, according to his knowledge, touching the matters relative to the contesting the right of *John Jones* to hold his seat in the house of representatives of the general assembly, by *David Smith*, on the part of the said *David Smith*, (or "*John Jones*,") and, also, to answer all such matters as shall be objected against him; for that the said E. F. having been duly subpœnaed to attend and give his testimony relative to the said points, has failed (or "refused) to attend in conformity to such subpœna, and have you then and there this precept.

Given under the hands and seals of the said justices, the day of 18

Jabez Fitch, [L. S.]
William T. Bayley, [L. S.]
Seth B. Farwell. [L. S.]

Form of oath or affirmation of witness.

You do swear, in the presence of the everliving God, (or "solemnly, sincerely, and truly declare and affirm,") that the evidence which you shall give touching the matters relative to the right of *John Jones* to hold his seat in the house of representatives in the general assembly, contested by *David Smith*, shall be the truth, the whole truth, and nothing but the truth.

Form of caption, taking and certifying depositions.

Depositions of witnesses produced, sworn, and examined, on the day of 18 at the house of in the county of *La Salle*, by *Jabez Fitch*, *William T. Bayley*, and *Seth B. Farwell*, Esquires, three of the justices of the peace of the county of *La Salle*, named, selected, and chosen pursuant to an act entitled "An act regulating elections," to take the depositions of witnesses touching the contesting of the election of *John Jones*, as a representative in the next general assembly, by *David Smith*, who was a candidate for the said office, under a notice for that purpose, a copy whereof, attested by the person who served the same, was delivered to us, and is hereunto attached.

A. B., of *Ottawa*, in the county of *La Salle*, aged years,

or thereabouts, a witness produced, sworn, and examined, on the part and behalf of the said *David Smith*, (or "of the said *John Jones*,") deposeth and saith as follows:

(The testimony of each witness should be carefully read over to him, that he may have an opportunity of correcting any mistakes, and it should then be signed by him.)

State of Illinois, }
La Salle county, } ss. We, the subscribers, three of the justices of the peace in and for the said county, do hereby certify that, having met at the time and place specified in the annexed notice, and hereinbefore mentioned, and after having sworn the witnesses produced, as well by the said *David Smith* as by the said *John Jones*, we heard the testimony of the said witnesses, and reduced the same to writing, and caused the testimony of each witness to be signed by him; and that the foregoing is all the testimony given before us relating to the said contested election.

In testimony whereof, we have hereunto set our hands and seals, this day of 18

Jabez Fitch, [L. S.]
William T. Bayley, [L. S.]
Seth B. Farwell. [L. S.]

Although the statute does not require the selection of the justice by the person whose election is contested, nor the choice of the third justice by the two selected, to be transmitted with the other papers, yet it seems proper that they should be.

2. *Of contesting an election by a candidate for sheriff, &c.*

By the common law, when a person claims or usurps any office, franchise, or liberty, the proceedings to enquire by what authority he supports his claims, in order to determine the right, are by *information* in the nature of a writ of *quo warranto*. 3 *Bl. Com.*, 262.

In this state a summary method has been provided by statute for contesting the validity of any election, or the right of any person declared duly elected to hold the office of sheriff, coroner, county commissioner, justice of the peace, or constable, by any candidate for either of the said offices.

By sec. 1 of "An act to amend an act entitled, 'An act to regulate elections'," it is enacted "That when any candidate shall desire to contest the validity of any election, or the right of any person declared duly elected, to hold and exercise the office of sheriff, coroner, county commissioner, justice of the peace, or constable, such candidate shall give notice of his intention, in writing, to the person whose election he intends to

contest, or leave a notice thereof at his usual place of residence, within thirty days after the day of election, expressing the points on which the same will be contested, the name of one of the justices of the peace, who will attend at the trial of such contest, the time, and the place, when and where the said trial will be holden; which time shall not exceed sixty days from the day of election. And the person whose election is contested, shall, within five days after receiving said notice, select another justice of the peace, to attend said trial: *Provided, however*, That should the party whose election is contested, refuse or neglect to select a justice as aforesaid, the justice chosen by the person contesting the election as aforesaid, shall make such selection, and the two justices so selected or chosen, shall make choice of a third justice; and if they cannot agree upon a third justice to act with them, they shall make such selection by lot; and the three justices thus selected, or either of them, shall have power, and they are hereby authorized and required, to issue subpœnas and such other process as may be necessary to secure the attendance at such trial of all persons whose testimony may be required by either party, in the same manner as is provided in other cases of proceedings before justices of the peace.

"SEC. 2. The said justices shall meet at the time and place appointed for the trial of said contest as aforesaid, and after hearing and examining the evidence offered by both of the parties, they shall decide which of the said candidates shall have been duly elected, and certify the same to the clerk of the county commissioners' court of the proper county, who shall thereupon make out and deliver to the successful party a certificate of his election.

"SEC. 3. The said justices shall enter judgment against the unsuccessful party for all the costs of such contest. Either party may appeal from the decision of said justice to the circuit court as in other cases; and the decision of the circuit court shall be final." *Gale's Stat.*, 271.

Form of notice to be given by a candidate, &c.

SIR:

You will please to take notice that, as a candidate for the office of *sheriff* at the last election, I intend to contest your right to hold and exercise the office of *sheriff* in and for the county of *La Salle*, and that the following are the points upon which your election will be contested, to wit:

First. (Here specify the points separately, clearly, and distinctly.)

And that *Jabez Fitch*, Esquire, one of the justices of the peace of the said county of *La Salle*, will attend at the trial of such contest, on the day of *instant*, at

in the noon, at his office in *Ottawa* in said county, in pursuance of the statute in such case made and provided. Dated, this day of 18 Yours, &c.

To Mr. *John Jones*. *David Smith*.

Form of selection of another justice by the person whose election is contested.

William T. Bayley, Esquire,

SIR: I have received notice from *David Smith*, a candidate at the last election for the office of sheriff, that he intends to contest my right to hold and exercise the office of sheriff in and for the county of *La Salle*, and that *Jabez Fitch*, Esquire, a justice of the peace of *La Salle* county, will attend at the trial of such contest, on the day of *instant*, at o'clock in the noon, at his office in *Ottawa*, in said county:

Therefore, I do hereby select you, being one of the justices of the peace of said county, to attend at the said trial, at the time and place above mentioned, in pursuance of the statute in such case made and provided. Dated, the day of 18 Yours, &c.

John Jones.

Form of affidavit of service.

State of Illinois, }
La Salle county, } ss. E. M., of *Ottawa*, in the said county, being duly sworn, says that, on the day of 18 he personally served upon *John Jones*, of said county, a notice, of which the within (or "annexed") is a copy, by delivering the same to him. E. M.

Sworn and subscribed before me, the day of 18 *Jabez Fitch*, Justice of the peace.

Form of choice of a third justice.

We, the subscribers, two of the justices of the peace of *La Salle* county, having been named and selected to attend on the day of *instant*, at o'clock in the noon, at the office of *Jabez Fitch*, Esquire, in *Ottawa*, in said county, at the trial of the right of *John Jones* to hold and exercise the office of *sheriff* of the said county of *La Salle*, contested by *David Smith*, a candidate for the said office at the last election, do hereby make choice of *Seth B. Farwell*, Esquire, one of the justices of the peace of said county, to attend with us at such trial at the time and place above mentioned, in pursuance of the statute in such case made and provided. Dated, the day of 18

Jabez Fitch,
William T. Bayley.

Form of subpœna.

State of Illinois, }
La Salle county, } ss. The people of the state of Illnois to G. H., I. J., K. L., and L. M.:

We command and require you, and each one of you, personally to be and appear before *Jabez Fitch*, *William T. Bayley*, and *Seth B. Farwell*, Esquires, three of the justices of the peace of the said county, on the day of *instant*, at o'clock in the noon at the office of *Jabez Fitch*, Esquire, in *Ottawa*, in said county, to testify the truth according to your knowledge touching the matters relative to contesting the right of *John Jones* to hold and exercise the office of *sheriff* of the said county, by *David Smith*, on the part of the said *David Smith*, (or "*John Jones*,") and this you are not to omit. Witness, the hand and seal of the said *Jabez Fitch*, Esquire, the day of 18

Jabez Fitch. [L. S.]

Form of oath or affirmation of witness.

You do swear, in the presence of the everliving God, (or "solemnly, sincerely, and truly declare and affirm,") that the evidence which you shall give touching the matters relative to the right of *John Jones* to hold and exercise the office of *sheriff* of the county of *La Salle*, contested by *David Smith*, shall be the truth, the whole truth, and nothing but the truth.

Form of certificate of election.

State of Illinois, }
La Salle county, } ss. Be it remembered, that we, *Jabez Fitch*, *William T. Bayley*, and *Seth B. Farwell*, Esquires, three of the justices of the peace of the said county, were duly named, selected, and chosen to attend, on the day of *instant*, at o'clock in the noon, at the office of *Jabez Fitch*, Esquire, in *Ottawa*, in said county, at the trial of the right of *John Jones*, to hold and exercise the office of *sheriff* of the said county of *La Salle*, contested by *David Smith*, a candidate for the said office, at the last election, in the following manner; that the said *Jabez Fitch*, Esquire, was named and selected by the said *David Smith*, that the said *William T. Bayley*, Esquire, was selected by said *John Jones*, and that the said *Seth B. Farwell*, Esquire, was chosen (or "selected by lot") by the two justices first named and selected and herein first above mentioned, to act with them; that we met at the time and place above mentioned, and the following notice and attestation of service thereof was delivered to us:

(Here set forth the notice given by *David Smith* to *John Jones*, and the affidavit of service:)

That, at the time and place aforesaid, as well the said *David Smith* as the said *John Jones* appeared before us; and after hearing and examining the evidence offered by both of the parties, we do decide and determine that the said *David Smith* has been duly elected *sheriff* of the said county of *La Salle*.

And we do adjudge and determine that the said *John Jones* pay all the costs of this contest, amounting to the sum of dollars, and that execution issue for the same.

In witness whereof, we do hereunto set our hands and seals, the day of 18

Jabez Fitch, [L. S.]
William T. Bayley, [L. S.]
Seth B. Farwell. [L. S.]

Form of certificate.

State of Illinois, }
La Salle county, } ss. We, the subscribers, three of the justices of the peace of the said county, do certify to the clerk of the county commissioners' court of the said county, that the above is a true record of the proceedings before us, and of our decision in the matter relative to the right of *John Jones* to hold and exercise the office of sheriff of *La Salle* county, contested by *David Smith*, and also of our adjudication concerning costs. Given under our hands this day of 18

Jabez Fitch,
William T. Bayley,
Seth B. Farwell.

Form of execution for costs.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county, greeting:

Whereas, *David Smith*, a candidate, lately gave notice to *John Jones* that he intended to contest his right to hold and exercise the office of sheriff of the county of *La Salle*, and named *Jabez Fitch*, Esquire, a justice of the peace of said county, to attend at the trial of such contest, on the day of 18 at his office in *Ottawa*, in said county; and whereas, the said *John Jones* did select *William T. Bayley*, Esquire, a justice of the peace of said county, to attend at the said trial; and whereas, the two justices so named and selected, did make choice of (or "select by lot") *Seth B. Farwell*, Esquire, a justice of the peace of said county, to act with them; and whereas, the said justices, in pursuance of their nomination, selection, and choice, and of the statute in such case made and provided, met at the time and place above mentioned, and as well the said *David Smith* as the said *John Jones* appeared before them, and the said

justice, having heard and examined the evidence offered by both of the parties, did decide and determine that the said *David Smith* had been duly elected *sheriff* of *La Salle* county.

And the said justices did adjudge and determine that the said *John Jones* pay all the costs of the said contest, amounting to the sum of dollars, and that execution issue for the same.

We, therefore, command you that, of the goods and chattels of the said *John Jones* in your county, you levy the said sum of dollars costs as aforesaid, and do you make return of what you shall do hereon with all convenient speed. Given under the hand and seals of the said justices, the day of 18

Jabez Fitch, [L. S.]
William T. Bayley, [L. S.]
Seth B. Farwell. [L. S.]

CHAPTER X.

ESTRAYS.

By sec. 1 of "An act concerning estrays" it is enacted "That every person who shall take up any estray horse, mare or colt, mule or ass, shall, within ten days, take the same before some justice of the peace of the county where such estray shall be taken up, and make oath before such justice, that the same was taken up at his or her plantation, or place of residence in said county, and that the marks on brands have not been altered since the taking up. The said justice shall then issue his warrant to three disinterested housekeepers in the neighborhood, unless they can otherwise be had, causing them to come before him to appraise said estray, after they or any two of them being sworn to appraise such estray, without partiality, favor or affection, which appraisement, together with the marks, brands, stature, color, and age of such horse, mare or colt, mule or ass, shall be entered in a book to be kept by such justice, and certified under his hand, and transmitted to the clerk of the county commissioners' court of such county, within fifteen days after the same is taken up; and any person who shall take up any head of neat cattle, sheep, hog or goat, shall cause the same to be viewed by some housekeeper of the county where the same shall happen, and shall immediately go with such

housekeeper before a justice of the county, and make oath before him as is required in taking up an estray horse, mare or colt, mule or ass, and then such justice shall take from such housekeeper, upon oath, a particular description of the marks, brands, color, and age of every such neat cattle, sheep, hog or goat, and said justice shall cause the said estrays to be appraised, in like manner, as is required to be done in case of a horse, mare or colt, mule or ass; which description and valuation shall be entered by such justice in a book to be kept by him as aforesaid, and by such justice transmitted to the clerk of the county commissioners' court of the county, to be by him kept as before directed: *Provided*, That in all cases where the value of such neat cattle, sheep, goat or hog, does not exceed five dollars, said justice shall not be required to make a return to the clerk as aforesaid; but shall enter in his estray book the description and appraisement value of such sheep, hog or goat, and advertise the same in three of the most public places in his neighborhood; and every such clerk shall cause a copy of such description and valuation of every neat cattle, sheep, hog and goat, to be publicly affixed at the court house door of his county, within five days after the same shall be transmitted to him as aforesaid, for which he shall receive the same fee as for entering the same in a book: *Provided*, That if two or more estrays, of the same species, are taken up by the same person, at the same time, they shall be included in one entry and one advertisement, and in such case, such justice and clerk shall receive no more pay than for one of such species: *Provided, also*, That no person shall be allowed hereafter to take up and post any head of neat cattle, sheep, hog or goat, between the month of April and the first day of November, unless the same may be found in the lawful fence or inclosure of the taker up, having broken in the same; and for a reward of taking up, there shall be paid by the owner, one dollar for every horse, mare or colt, mule or ass; and for every head of neat cattle, fifty cents; and for every hog, sheep or goat, twenty-five cents, together with all reasonable charges.

"SEC. 2. It shall be the duty of the clerk of the county commissioners' court, when the description and valuation of any estray horse, mare or colt, mule or ass, shall be transmitted to him by the justice as aforesaid, and in ten days thereafter, make out a copy thereof, and transmit the same to the public printer of the state, and endorse thereon, "Estray papers," together with the sum of one dollar, to pay the said printer; which sum the taker up is required to deposite with the clerk prior to the expiration of said ten days. It shall be the duty of the public printer to publish said advertisement, and transmit one copy of each number of his paper to each of the clerks of the county

commissioners' court of the several counties of this state, free of charge, which shall be regularly filed by said clerks in their respective offices for the examination of those who may desire it.

"SEC. 3. And if no owner appears and proves his property within one year after such publication, the property shall be vested in the taker up; nevertheless, the former owner may, at any time thereafter, by proving his property, recover the valuation money, upon payment of costs and all reasonable charges.

"SEC. 4. And if any person shall trade, sell, or take away any such estray or estrays out of the state, for any purpose whatever, before the expiration of said one year, he or she so offending, shall be liable to indictment in the circuit court of the proper county, and on conviction thereof, shall be fined in a sum double the value of the property, one half to the owner thereof, and the other half to the county treasury; and when the owner of any estray head of neat cattle, sheep, hog or goat, does not prove his property within twelve months after the same has been published at the door of the court house as aforesaid, and when the valuation does not exceed five dollars, the property shall be vested in the taker up; but when the valuation shall exceed five dollars, and no owner appears within the time aforesaid, the property shall also be vested in the taker up; nevertheless, the former owner may, at any time, by proving his property, recover the valuation thereof, upon payment of all reasonable costs and charges; and if the taker up and the owner cannot agree upon the charges, they shall call upon three disinterested householders, whose decision shall be binding on both parties; and it shall not be lawful for any person to take up any estray, (except such as shall be hereinafter excepted,) unless he shall be a freeholder or a housekeeper. Any person finding an estray horse, mare or colt, running at large without any of the settlements of this state, may take up the same, and shall immediately take such estray or estrays before the nearest justice of the peace, and make oath that he has not altered the marks or brands or such estrays, since taking up; and if such taker up shall be a freeholder or a housekeeper within that county, it may, and shall be lawful for him, to post such estray or estrays as hereinbefore directed in this act, as if the same had been taken up on his plantation or place of residence; and when the taker up shall not be qualified as aforesaid, he shall take the oath before required, and deliver such estray or estrays, to the said justice, who shall cause the same to be dealt with as directed by this act; but if no owner appears to prove his property within one year, such estray or estrays shall be sold to the highest bidder giving public notice of such sale twenty days previous

thereto, the purchaser giving a bond and approved security, payable to the county commissioners' court of the county where such estray shall be taken up, and after paying the taker up all reasonable charges, the balance shall be put into the county treasury by the said justice, who shall take a receipt for the same from the county treasurer; nevertheless, the former owner, at any time within two years after taking up, by proving his property before the clerk of the county commissioners' court of said county, or before the justice of the peace before whom the property was taken up, and obtaining a certificate thereof from the clerk of said court or justice of the peace, to the treasury shall receive the balance aforesaid.

"SEC. 5. And when any justice of the peace shall fail to pay any money for any estray or estrays to be sold agreeably to this act, into the county treasury, within three months after selling such estray or estrays, such justice shall forfeit and pay the sum of twenty dollars, with costs, to be recovered by action of debt, before any justice of the peace of the county, or other court having jurisdiction thereof, the one half for the use of the county, and the other half for the use of any person suing for the same; and moreover, be liable to pay the price of such estray or estrays, with interest thereon.

"SEC. 6. If any estray or estrays, taken up as aforesaid, shall die or get away before the owner shall claim his or her right, the taker up shall not be liable for the same; and if any person shall take up any estray or estrays, at any other place within the inhabited parts of this state than his or her plantation or place of residence, or without being qualified as required by this act, he shall forfeit and pay the sum of ten dollars, with costs, recoverable before any justice of the peace of the county where the offence shall have been committed, and not having property sufficient to pay such fine, he shall be liable to be confined one month in the jail of the county where he may be found, being found guilty of such offence according to law; and any person taking up any estray or estrays out of the limits of the settlements of this state, and failing to comply with the requisitions of this act, shall be liable to the same penalties; and if any person, taking up any estray or estrays, of any species, fails to comply with the requisitions of this act, he shall, for every such offence, forfeit and pay to the informer, the sum of ten dollars, with costs, recoverable before any justice of the county where such offence shall be committed; one half to the use of the county, and the other half to the use of the person suing for the same.

"SEC. 7. That if any person or persons shall hereafter stop, or take up any keel or flat boat, ferry flat, batteau, perogue, canoe, or other vessel or water craft, or raft of

timber, or plank, found adrift on any water course within the limits, or upon the borders of this state, and the same shall be of the value of five dollars or upwards, it shall be the duty of such person, or persons, within five days thereafter, (*provided* the same shall not before that time be proven and restored to the owner,) to go before some justice of the peace of the proper county, and make affidavit in writing, setting forth the exact description of such vessel or craft, when and where the same was found, whether any, and if so, what cargo was found on board, and that the same has not been altered or defaced, either in whole or in part, since the taking up, either by him, her or them, or by any other person or persons, to his, her or their knowledge; and the said justice shall thereupon issue his warrant, directed to some constable of his county, commanding him forthwith, to summon three respectable householders of the neighborhood, if they cannot otherwise be had, whose duty it shall be, after being sworn by said justice, to proceed without delay, to examine and appraise such boat or vessel, and cargo, if any, and make report thereof, under their hands and seals, to the justice issuing such warrant, who shall enter such appraisement, together with the affidavit of the taker up, at large in his estray book; and it shall be the further duty of said justice, within ten days after the said proceedings shall have been entered in his estray book as aforesaid, to transmit a certified copy thereof to the clerk of the county commissioners' court of his county, to be by him recorded in his estray book, and filed in his office.

"SEC. 8. In all cases where the appraisement of such boat or water craft, including her cargo, shall not exceed the sum of twenty dollars, the taker up shall advertise the same on the door of the court house, and in three of the most public places in the county, within ten days after the justice's said certificate shall have been entered on the records of the county commissioners' court, and if no person shall appear to prove and claim such boat or water craft, within six months from the time of taking up as aforesaid, the property in the same shall vest in the taker up; but if the value thereof shall exceed the sum of twenty dollars, it shall be the duty of the clerk of the county commissioners' court, within twenty days from the time of the reception of the justice's said certificate at his office, to cause an advertisement to be set up on the door of the court house, and also a notice thereof to be sent to the public printer as aforesaid, who shall publish the same as aforesaid; and if the said vessel be not claimed and proven within six months from said advertisement, the same shall be vested in the taker up; nevertheless, the former owner may, at any time thereafter, recover the valuation money by proving his property, allowing to the

taker up a reasonable compensation for his trouble, and costs and charges.

"SEC. 9. In all cases where services shall be performed by any officer or other person or persons under this act, the following fees or compensation shall be allowed, to wit: To the justice of the peace for administering oath to the taker up or finder, making an entry thereof, with the report of the appraisers, and making and transmitting a certificate thereof to the clerk of the county commissioners' court, fifty cents; to the clerk or justice for taking proof of the ownership of, and granting a certificate of the same, twenty-five cents; for registering each certificate transmitted to him by any justice as aforesaid, twelve and a half cents; for advertisements, including the newspaper publications, fifty cents in addition to the cost of such publication; to the constable for each warrant so served on appraisers, twenty-five cents; and to each appraiser the sum of twenty-five cents; which said fees shall be paid by the taker up to the person entitled thereto, whenever said services shall be rendered. All which costs and charges shall be reimbursed to the taker up or finder, in all cases where restitution of the property shall be made to the owner, in addition to the reward to which such person may be entitled for taking up as aforesaid.

"SEC. 10. If any person shall act contrary to the duties enjoined by this act, for which no penalty is hereinbefore pointed out, the person so offending shall, on conviction thereof, forfeit and pay for every such offence, not less than five nor more than one hundred dollars, to be sued for in the name of the proper county, before any justice of the peace or other court having cognizance thereof." *Gale's Stat.*, 282.

By sec. 1 of an act passed March 4th, 1843, it is enacted "That it shall not be lawful for any person or persons to use any estray horse, mare, mule, or ass, unless the same shall have been first advertised as required by the provisions of this act.

"SEC. 2. That hereafter it shall be the duty of any person taking up any estray animal or lost goods, within five days after the same is so taken up, to post up written notices describing the property in three of the most public places in the neighborhood where the taker up resides, for at least twenty days before having the same appraised, according to the provisions of the act to which this is an amendment. So much of the act of which this is an amendment as makes it the duty of the taker up to have the property appraised within ten days is here repealed; *Provided, always*, that when any property so taken up, or found, as the case may be, and shall be proven away before the expiration of twenty days, then and in that case the claimant of such property shall pay to the taker up, or finder, as the case may be, all reasonable charges for taking

up and keeping the same. This act to be in force from and after its passage." *Sess. Laws*, 139.

By sec. 1 of an act passed March 6th, 1843, it is enacted "That hereafter it shall be the duty of the taker up of any estray horse, mare, colt, mule, or ass, or other estray animal, previous to having the same appraised, to give not less than ten nor more than fifteen days notice, by posting up written or printed advertisements, if a horse, mare, colt, mule, or ass, in three of the most public places in the justice's district in which the taker up shall reside, and for all other animals, by posting up such advertisements in three of the most public places in the neighborhood in which the taker up shall reside, particularly describing said estrays in the manner required by the act to which this is an amendment; and it shall be the duty of the taker up, previous to such appraisement, to prove the posting up of such advertisements agreeably to the provisions of this act, before the justice before whom such appraisement shall be made, by his own oath, or that of a credible witness." *Sess. Laws*, 140.

Form of advertisement of an estray.

NOTICE OF AN ESTRAY.

Taken up as an estray by the subscriber, at his place of residence (or "plantation") in *Mission precinct*, in *La Salle* county, on the day of 18 a *sorrel mare*, *four* years old, or thereabouts, *fifteen* hands high, having a star in her forehead and branded with the letters S. R. on the *left shoulder;* which I intend to have appraised according to the statutes in such case made and provided. Dated, the day of 18

A. B.

Oath of the person taking up an estray, and proof of posting advertisements.

La Salle county, }
Mission precinct, } ss. A. B., of said *Mission* precinct, being duly sworn, deposes and says, that he is a freeholder (or "housekeeper") of said county, that on the day of 18 at his place of residence (or "plantation") in the said county, he took up as an estray, a sorrel mare, particularly described in the advertisement of which the following is a copy, viz:

(Here insert a copy of the advertisement:)

that, on the day of 18 he posted up copies of the said advertisement in three of the most public places in said precinct, (or, if neat cattle, &c., then say "his neighborhood;")

that the marks or brands of the said *mare* have not been altered since the taking up. A. B.
Subscribed and sworn before me, this day of 18 *Ebenezer Neff*, Justice of the peace.

Form of advertisement when an estray is taken up without any of the settlements, &c.

NOTICE OF AN ESTRAY.

Taken up as an estray by the subscriber, of the county of *La Salle*, on the day of 18 in the said county, a *bay* horse, *six* years old, or thereabouts, *fourteen* hands high, having white hind feet, branded with the letters L. M. on the *right shoulder*, running at large without any of the settlements of this state; which I intend to have appraised according to the statute in such case made and provided. Dated, the day of 18 A. B.

Oath of taking up an estray, and proof of posting the above advertisement.

La Salle county, }
Mission precinct, } ss. A. B., of said county, being duly sworn, deposes and says, *that he is a housekeeper*, (or "*freeholder ;*") (if the taker up is not a housekeeper or freeholder, then omit the words in italics;) that on the day of 18 in the said county, he took up as an estray, a *bay* horse, particularly described in an advertisement of which the following is a copy, viz:

(Here insert the advertisement:)

that, on the day of 18 he posted up copies of the said advertisement, in three of the most public places in said precinct; and that the marks or brands of the said horse have not been altered since the taking up.
Subscribed and sworn before me, the day of 18 *Ebenezer Neff*, Justice of the peace. A. B.

Form of appointment of appraisers.

To E. F., G. H., and I. J., three housekeepers in the neighborhood of A. B., in *Mission* precinct, *La Salle* county:

Whereas, A. B. has made application before me, the subscriber, one of the justices of the peace in and for *La Salle* county, for the appointment of three disinterested housekeepers in the neighborhood, to appraise a *sorrel mare* taken up by him as an estray at his place of residence (or "plantation")

in said county, and proved before me that he had posted up written advertisements of the taking up, *ten* days previous to the making of said application:

This is, therefore, to appoint you to appear before me forthwith, (or "on the day of 18 at o'clock in the noon,") and, after being duly sworn, to appraise the said estray, and to report to me your appraisement. Witness, *Ebenezer Neff*, Esquire, justice of the peace in *Mission* precinct, in said county, the day of 18

Ebenezer Neff.

Form of warrant for appraisers.

La Salle county, }
Mission precinct, } ss. The people of the state of Illinois to any constable of the said county:

Whereas, A. B. has made application before *Ebenezer Neff*, Esquire, one of the justices of the peace of the said county, for the appointment of three disinterested housekeepers in the neighborhood, to appraise a *sorrel mare*, taken up by him as an estray at his residence (or "plantation") in said county, and proved before the said justice that he had posted up *written* advertisements of the taking up, *ten* days previous to the making of said application:

And whereas, it has been made satisfactorily to appear to the said justice, by the oath of the said A. B., that appraisers cannot be had without a warrant for that purpose:

We, therefore, command you to cause E. F., G. H., and I. J. personally to appear before the said justice, forthwith, (or "on the day of 18 at o'clock in the noon,") at his office in *Mission* precinct, to appraise under oath the said estray, and to report to him their appraisement.

In witness whereof, the said justice has hereunto set his hand and seal, this day of 18

Ebenezer Neff. [L. S.]

Form of oath or affirmation of appraisers.

You, and each of you, do swear by the ever living God, (or "solemnly, sincerely, and truly declare and affirm,") that you will appraise the *horse* now shown to you as an estray, taken up by A. B., without partiality, favor, or affection.

Form of report of appraisement.

La Salle county, }
Mission precinct, } ss. We, the undersigned, housekeepers in said precinct, appraisers appointed and sworn by *Ebenezer Neff*, Esquire, one of the justices of the peace of said county,

do respectfully report to you, the said justice, that we have examined a bay horse, six years old, or thereabouts, fourteen hands high, having white hind feet, and branded with the letters L. M. on the *right shoulder*, shown to us as an estray taken up by A. B., and have appraised the said horse at the sum of dollars. Dated, this day of 18 E. F. [L. S.]
G. H. [L. S.]
I. J. [L. S.]

Form of entry to be made by justice on estray book.

La Salle county, }
Mission precinct, } ss. Be it remembered, that, on the day of 18 A. B. of said county, appeared before me, *Ebenezer Neff*, Esquire, a justice of the peace of the said county, and took and subscribed the following oath, viz: (set out the oath at length.)

That I did thereupon appoint (or "cause") E. F., G. H., and I. J., three disinterested housekeepers of the neighborhood, to come before me forthwith, (or "on the day of 18) to appraise the said estray, and report to me their appraisement; who did thereupon forthwith (or "on the day of 18) appear, and having been by me duly sworn to appraise the said estray without partiality, favor, or affection, did appraise the same and reported to me their appraisement in the words following, viz: (here insert the report at length.)

In witness whereof, the said justice of the peace has hereto set his hand and seal, the day of 18
Ebenezer Neff. [L. S.]

A copy of the above should be transmitted to the clerk in all cases, (except in case of neat cattle, sheep, hogs, and goats, where the valuation does not exceed five dollars,) and certified as follows, viz:

La Salle county, }
Mission precinct, } ss. I, *Ebenezer Neff*, one of the justices of the peace in and for the said county, do hereby certify that the above is a true copy of the proceedings in relation to the estray therein described, as entered by me on my estray book. Dated, this day of 18 *Ebenezer Neff.*

Form of advertisement of neat cattle, &c., by the justice, valuation not exceeding five dollars.

NOTICE OF AN ESTRAY.

Taken up as an estray, by A. B. of *La Salle* county, on the day of 18 (describe the estray,) which has been appraised at the sum of *three* dollars, by three ap-

praisers appointed and sworn by me. Dated, the day of 18

Ebenezer Neff,
Justice of the peace.

Form of affidavit by taker up of water craft.

State of Illinois, }
La Salle county, } ss. A. B., of said county, being duly sworn, deposes and says, that on the day of 18 about a mile below *Ottawa*, in said county, on the *Illinois river*, he found adrift a flat-boat feet long, and feet wide, the sides thereof being black walnut and the bottom oak; (give an exact description of the vessel or craft, whether any, and if so, what kind of cargo was found on board;) that he then and there took up the said flat-boat; and that the same has not been altered or defaced, either in whole or in part, since the taking up, either by him or any other person or persons, to his knowledge. A. B.

Subscribed and sworn before me, this day of 18 *Jabez Fitch*,
Justice of the peace.

Form of warrant to summon appraisers.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of said county, Greeting:

Whereas, A. B. of said county has, on the day of 18 made affidavit in writing, before *Jabez Fitch*, Esquire, one of the justices of the peace of the said county, that, on the day of 18 he found adrift on the *Illinois river*, a (describe the craft as in the affidavit,) and then and there took up the same.

You are, therefore, hereby commanded to summon three respectable householders of the neighborhood to appear forthwith before me, to be by me duly sworn to examine and appraise said flat-boat.

Witness, *Jabez Fitch*, Esquire, justice of the peace at *Ottawa*, in said county, this day of 18

Jabez Fitch.

Oath of appraisers.

You, and each of you, do solemnly swear by the ever living God, that you will, without partiality, favor, or affection, examine and appraise a flat-boat taken up adrift by A. B. of said county, and make a true report thereof.

Report of appraisers.

State of Illinois, }
La Salle county, } ss. We, the undersigned, householders of said county, appraisers appointed and sworn by *Jabez Fitch*, Esquire, one of the justices of the peace in and for the said county, do respectfully report, that we have examined a flat-boat, feet long, feet wide, &c., (description of flat,) shown to us as the one found adrift on the *Illinois river*, and taken up by A. B., of said county, and have appraised the said flat-boat at the sum of dollars. (If it be a boat and cargo, then add,)

And we do further report, that we have appraised the cargo of said boat as follows, viz:

10 barrels of flour, ...	$40 00
50 bushels of potatoes, ...	12 00

In witness whereof, we have, this day of 18 hereto set our hands and seals.

E. F. [L. S.]
G. H. [L. S.]
I. J. [L. S.]

Form of entry by justice in his estray book in case of taking up water craft.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 A. B., of said county, appeared before me *Jabez Fitch*, Esquire, a justice of the peace, and took and subscribed an affidavit in the words following, viz: (set out affidavit at length.)

That I did thereupon appoint E. F., G. H., and I. J., three respectable householders of the neighborhood, forthwith to appraise the said flat-boat ("and cargo," if any,) who being by me first duly sworn to examine and appraise the same, without partiality, favor, or affection, and make a true report thereof, made their report to me in the words following, viz: (Here set out the report at length.)

In witness whereof, the said justice has hereunto set his hand and seal, this day of 18

Jabez Fitch. [L. S.]

State of Illinois, }
La Salle county, } ss. I, *Jabez Fitch*, justice of the peace in and for the said county, do hereby certify that the above is a true copy of the proceedings in relation to the flat-boat, &c., therein described, as entered by me on my estray book. Dated, the day of 18 *Jabez Fitch.* [L. S.]

Advertisement by the taker up where appraisement of the craft, including the cargo, does not exceed twenty dollars.

NOTICE.

Taken up by the subscriber, on the day of 18 (describe accurately the craft and cargo, *if any*,) found adrift on the *Illinois river*, about a mile below *Ottawa*, in *La Salle* county, which I have caused to be appraised according to law. Dated, the day of 18 A. B.

CHAPTER XI.

FORCIBLE ENTRY AND DETAINER.

Force, in the common law, is most usually applied to the evil part, and signifieth unlawful violence used either to things or persons. 1 *Inst.*, 161.

Our law taketh knowledge of two manners of force. The one may be termed a force in judgment of law, which accounteth every private trespass to be a force, so that if I do but pass over another man's ground without license, he may have his action of trespass against me, why or wherefore with force and arms, &c. The other manner of force is more apparent, and always carries with it some fearful show and matter of terror, and must have one of these badges, that is, it must be either with strong hand, or with a multitude of people. *Dalt. Justice*, 417.

It seems that, at the common law, a man disseized of any lands or tenements, if he could not prevail by fair means, might lawfully regain the possession thereof by force, unless he were put to the necessity of bringing his action by having neglected to re-enter in due time. 1 *Hawk.*, 140. Before the statute of Richard II., any man might have entered into lands and tenements with force and arms, and also to have kept and detained them with force, where his entry was lawful; *Dalt. Justice,* 415; though he would be indictable at common law for a breach of the peace. 9 *Wend. Rep.*, 201. 4 *Dane's Ab.*, 731.

But this indulgence of the common law, in suffering persons to regain the lands they were unlawfully deprived of, having been found by experience to be very prejudicial to the public peace, by giving an opportunity to powerful men, under the pretence of feigned titles, forcibly to eject their weaker neighbors, and, also, by force, to retain their wrongful possessions, it was thought necessary, by statute, to restrain all persons from the use of such violent methods of doing themselves justice. 4 *Bl. Com.*, 148. So that the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained with force and violence and unusual weapons. 4 *Bl. Com.*, 148.

Forcible entry and detainer are offences at the common law, and subject the party guilty thereof to an indictment; but then the indictment ought to express not only the common technical words *with force and arms*, but also such circumstances as thereby it may appear upon the face of the indictment to be more than a common trespass. 3 *Burr*, 1731. 8 *Term Rep.*, 357.

By sec. 1 of "An act concerning forcible entry and detainer," it is enacted "That if any person shall make any entry into any lands, tenements, or other possessions, except in cases where entry is given by law, or shall make any such entry by force, or if any person shall wilfully and without force, hold over any lands, tenements, or other possessions, after the determination of the time for which such lands, tenements, or possessions were let to him, or to the person under whom he claims, after demand made in writing for possession thereof, by the person entitled to such possession, such person shall be adjudged guilty of a forcible entry and detainer, or of forcible detainer, as the case may be, within the intent and meaning of this act." *Gale's Stat.*, 313.

This statute, and the rules applicable thereto, may be considered with reference to,

1. What amounts to a forcible entry and detainer, or to a forcible detainer.
2. What persons may be guilty thereof.
3. The possessions in respect of which one may be guilty of a forcible entry or detainer.
4. The complaint, and what it shall contain.
5. The proceedings under the statutes.

1. WHAT AMOUNTS TO A FORCIBLE ENTRY AND DETAINER, OR TO A FORCIBLE DETAINER.

It has been held by the supreme court, that our statute provides a remedy for three classes of cases. 1 *Scam. Rep.*, 407.

1. For making entry when it is not given by law.
2. For making entry by force.
3. For wilfully and without force holding over by a tenant.

1. *For making entry when it is not given by law.*

On the trial of the cause of Atkison *v.* Lester *et al.*, the court gave to the jury the following, among other instructions, "That if they should believe from the evidence, that the defendant entered wrongfully and without lawful right, and then kept the plaintiffs out from regaining possession, it is sufficient to sustain this action; and it is not necessary to prove actual force and physical violence to sustain this action." On appeal to the supreme court, Smith, Justice, in delivering the opinion of the court, said, "This case may be arranged under the first class contemplated by the statute; and the instructions of the court were directly applicable to it, and properly given." 1 *Scam. Rep.*, 407.

But where entry is given by law, and a person having the right enters in a peaceable manner, and takes possession of the land, he does not render himself liable to be turned out by proceedings under this act.

Thus, a purchaser of real estate under a *fieri facias* may enter and take possession of the premises in a peaceable manner, though some goods of the former proprietor are left on the premises, 3 *Term. Rep.*, 293. 1 *Johns. Rep.*, 43, after the time for redemption has expired.

If, by fair means, a man whose entry is lawful shall persuade or intice them who are within the house to come out, and then, the door being open, or latched only, he shall enter peaceably, without multitude of people, or offensive weapons, or other violence, this entry is justifiable. *Dalt. Justice*, 419. 3 *Bac. Ab.*, 252.

So it is if he shall enter peaceably, and then by gentle persuasion send them out that are within the house, and after shut the door and keep them out, this is justifiable. *Dalt. Justice*, 419.

So it is if he whose entry is lawful shall enter peaceably into his house, the doors being open, or latched only, and being so entered shall continue and abide there peaceably, this is justifiable. *Dalt. Justice*, 419. 4 *Dane's Ab.*, 732.

If one find a man out of his house, and forcibly withhold him from returning to it, and send persons to take possession thereof in the party's absence, this, by some opinions, says Mr. Hawkins, is no forcible entry, inasmuch as he did no violence to the house, but only to the person of the other; but he himself is of a contrary opinion, for, though the force be not actually done upon the land, nor in the very act of entry, yet, since it is used with an immediate intent to make such entry, and the manner of doing it only prevents the opposition, it cannot be said to be without force, which, whether it be upon or off the land, seems equally within the statute. 3 *Bac. Ab.*, 252.

And it seems that, by the first branch of our statute concerning forcible entry and detainer, a person who has a lawful

right of entry into any lands, tenements, or other possessions, has the same right to regain possession thereof as was allowed by the common law, excepting that it shall not be done in a forcible or violent manner; and, therefore, an entry which has no other force than such as is implied by law in every trespass whatsoever, is not within this part of the statute.

2. *For making entry by force.*

A forcible entry must, regularly, be with a strong hand, with unusual weapons, or with menace of life or limb; it must be accompanied with some circumstances of actual violence or terror, and an entry which has no other force than such as is implied by the law in every trespass, is not within this branch of the statute. 1 *Russ. on Crimes*, 287. 3 *Bac. Ab.*, 252. 17 *Wend. Rep.*, 257.

An entry may be forcible not only in respect of a violence actually done to the person of a man, as by beating him if he refuse to relinquish his possession; but also in respect of any other kind of violence in the manner of the entry, as by breaking open the doors of a house, whether any person be in it at the time or not, especially if it be a dwelling house. 1 *Russ. on Crimes*, 287. 1 *Hawk.*, 145.

If, therefore, one or more persons shall come weaponed, with guns, pikes, clubs, stones, or the like, to a house or land, and shall violently enter thereinto, this is a forcibly entry. Much more if, being so entered, he or they shall there offer violence or threaten harm to the person of any that are in possession thereof. Most of all, if he or they shall forcibly and furiously expel and drive another out of his possession. *Dalt. Justice*, 417.

Whenever a man, either by his behavior or speech at the time of his entry, gives those who are in possession of the tenements which he claims, just cause to fear that he will do them some bodily hurt if they will not give way to him, his entry is esteemed forcible, whether he cause such terror by carrying with him an unusual number of persons, or by arming himself in such a manner as plainly intimates a design to back his pretensions by force, or by actually threatening to kill, maim, or beat those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force against those who shall make any resistence. 1 *Russ. on Crimes*, 287.

If he or they who shall enter peaceably shall, after their entry, offer apparent violence, threatening or fear of harm to the person of any that is in possession, to the intent to get him out, and to make him leave the possession, though they do not put him out, much more if they get possession thereby, it is a forcible entry; *Dalt. Justice*, 418; and so, perhaps, may be an act of outrage after the entry, as by forcibly and wrongfully car-

rying away or removing the party's goods; 2 *Burn's Justice*, 259. *Dalt. Justice*, 419; for such an act may amount to a disseizin.

So, if he or they that have entered peaceably shall use words to any in possession to this effect, as to say, they will hold or keep possession though they die for it, or in spite of all men, or such like or other threatening words, this makes it a forcible entry. *Dalt. Justice*, 418. 3 *Bac. Ab.*, 252.

If divers persons shall come with weapons not usually carried by them, to a house that is open, or to ground, and there shall enter peaceably, without any disturbance, yet this is a forcible entry, for it shall be intended that they would have used force if they had been resisted. *Dalt. Justice*, 418.

But it seems that no entry shall be judged forcible from any threatening to spoil another's goods, or to destroy his cattle, or to do him any other such like damage, which is not personal. 1 *Hawk.*, 145. *Dalt. Justice*, 421.

If a house be bolted, it is forcible to break it open; but it is not so to draw a latch, or pull back the bolt of the door, (there being no appearance of force,) and enter into the house, for such an act as commonly passes between neighbors will not bring a man within the meaning of the statute. 3 *Bac. Ab.*, 252. 2 *Burn's Justice*, 259. And it has been held that an entry into a house through a window, or by opening a door with a key, is not forcible. 2 *Roll. Rep.*, 2. 4 *Dane's Ab.*, 732.

A man may be guilty of a forcible entry into a dwelling house though there be nobody in the house at the time; and so he may be by an entry into lands where any man's wife, children, or servants are upon the lands to preserve the possession, because whatsoever a man does by his agents, is his own act; but his cattle being upon the land, do not preserve his possession, because they are not capable of being substituted as agents, and, therefore, their remaining upon the land continues no possession. 3 *Bac. Ab.*, 253.

One person may commit a forcible entry as well as a number. 2 *Burn's Justice*, 259.

If several come in company where their entry is not lawful, and all of them, saving one, enter in a peaceable manner, and that one only use force, it is a forcible entry in them all, because they came in company to do an unlawful act, and, therefore, the act of one is the act of them all, and he is presumed to be only the instrument of the rest; but otherwise it is where one had a right of entry, for there they only come to do a lawful act, and, therefore, it is the force of him only who used it. 3 *Bac. Ab.*, 253.

The branch of the statute under which this class of cases falls, gives no remedy to the injured party against the person who has peaceably and without force got into possession of his house or land, although he may retain the possession by force and violence; for the statute only authorizes the justice

to enquire, and the jury to try, whether the entry was forcible, and the possession still detained. 4 *Dane's Ab.*, 733.

This part of the statute is remedial, and intended to restrain all persons from having recourse to violent methods for obtaining their possessions and doing themselves justice; and the object and policy of it is the preservation of the public peace.

Where a person makes forcible entry into any lands, tenements, or other possessions, and retains the possession thereof, it seems that he comes within the provisions of the statute, and shall be adjudged guilty of a forcible entry and detainer. The forcible entry is the offence, and the detainer is only a continuation of it; for, if the entry was by *right* and *peaceable*, the defendant might be entitled to detain by force.

3. *For wilfully and without force holding over by a tenant.*

If any person shall wilfully and without force hold over any lands, tenements, or other possessions, after the determination of the time for which such lands, tenements, or possessions were let to him, or to the person under whom he claims, after demand made in writing for possession thereof, by the person entitled to such possession, such person shall be adjudged guilty of a forcible detainer. *Gale's Stat.*, 313. *Breese Rep.*, 264. 1 *Scam. Rep.*, 496.

Under this branch of the statute, it is not necessary that it should appear that the detainer was preceded by an unlawful or illegal entry, and it is not essential that there should be any force exercised by the defendant to subject himself to proceedings under it.

If the relation of landlord and tenant is shown to exist, and that the time for which the lands, tenements, or other possessions were let to the tenant, or the person under whom he claims, has expired, and that he holds over after demand made in writing for possession thereof, by the person entitled to such possession, the statute authorizes proceedings to be instituted against him for a forcible detainer. 1 *Scam. Rep.*, 497. *Breese Rep.*, 264.

2. WHAT PERSONS MAY BE GUILTY THEREOF.

A man who breaks open the doors of his own dwelling house, which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it, cannot be guilty of a forcible entry or detainer within the statute. 3 *Bac. Ab.*, 254.

When two persons are in possession of a house, &c., and the one claims by one title, and the other by another title, here the law shall adjudge him to be in possession who has the best right; so that if A. shall wrongfully enter upon B., and they both shall continue in the house, and, after, B. shall put out A.

with force ; A. shall not be restored, for he never gained any possession by his entry. *Dalt. Justice*, 437.

A joint-tenant, or a tenant in common, may offend against the purport of these statutes (the English statutes) either by forcibly ejecting or forcibly holding out his companion ; for, though the entry of such tenant may be lawful, *per my et per tout*, so that he cannot in any case be punished, in an action of trespass, at the common law ; yet, the lawfulness of the entry no way excuses the violence, or lessens the injury done to his companion, and, consequently, an indictment of forcible entry into a moiety of a manor, &c., is good. 3 *Bac. Ab.*, 254.

In the case of Mason *v.* Finch, which was upon the complaint of one joint-tenant against his co-tenant, for forcibly entering and turning him out of his moiety of a dwelling-house; Lockwood, Justice, in delivering the opinion of the court, says, that, "Although at common law one joint-tenant cannot maintain trespass against his co-tenant, yet he may maintain ejectment if he can prove an actual ouster, which rebuts the presumption that the possession of one is the possession of the other, and we can see no reason, if the ejected co-tenant may maintain ejectment, why he may not avail himself of the summary remedy furnished by the statutes." 1 *Scam. Rep.*, 495. Accordingly it was held that the judgment against the defendant, upon the verdict of guilty, that the plaintiff have restitution of the moiety or one-half of the whole dwelling-house described in the complaint, should be affirmed.

When a man has been in possession of land for a great length of time by a defeasible title, and a claim is made by him who has a right of entry, the wrongful possessor continuing his occupation, will be punishable for a forcible entry, because all his estate was defeated by the claim, and his continuance in possession afterwards, amounts, in the judgment of the law, to a new entry. 1 *Inst.*, 256. 2 *Burn's Justice*, 258.

An infant of the age of eighteen years may, by his own act, commit a forcible entry ; and so he may though he be under the age of eighteen, if he be of the age of discretion, that is, of the age of ten years, by our statute. And so a *feme covert*, by her own act, may commit a forcible entry. But it is clearly agreed that the command of an infant, or *feme covert*, to enter, is void ; and, therefore, only the person entering under such command, is punishable by the English statutes. 3 *Bac. Ab.*, 255. *Dalt. Justice*, 422.

3. OF THE POSSESSION IN RESPECT OF WHICH ONE MAY BE GUILTY OF A FORCIBLE ENTRY AND DETAINER, OR FORCIBLE DETAINER.

A person may be guilty of this offence by a force done to ecclesiastical possessions, as churches, vicarage-houses, &c.,

as much as if it were done to a temporal inheritance. 3 *Bac. Ab.*, 254.

The trustees of an incorporated religious society are, by virtue of their office, entitled to the possession of all the temporalities, and are considered as lawfully seized of the ground and buildings belonging to the church; and if the trustees close the door of the church against the minister and congregation, and they break and enter the church by force, proceedings for a forcible entry will lie against them, at the instance of the trustees. 9 *Johns. Rep.*, 147.

It has been held, as a general rule, that a person may be indicted for a forcible entry into any incorporeal hereditament for which a writ of entry will lie, either by the common law, as for rent, or by statute, as for tithes, &c. 1 *Russ. on Crimes*, 286.

It is, however, questionable, whether there be any good authority that such an indictment will lie for a common or office. 1 *Hawk.*, 146. Though it seems agreed that an indictment for forcible detainer lies against any one, whether he be the *terre-tenant* or a stranger, who shall forcibly disturb the lawful proprietor in the enjoyment of these possessions, as violently resisting a lord in his distress for rent, or by menacing a commoner with bodily hurt if he dare put his beasts into the common, &c. 1 *Russ. on Crimes.*, 286.

But no one can come within the statute by a violence offered to another in respect of a way or such like easement, which is no possession. 3 *Bac. Ab.*, 254.

As our statute concerning forcible entries and detainers only provides for the restitution of the premises, and does not authorize the punishment of any person offending against it, either by fine or imprisonment, it seems that proceedings under it can be sustained only for such hereditaments to which a man, if he had a right, might have asserted that right by a peaceable entry, as tenements visible and corporeal; and not for such whereof he could be put out of possession only at his own election, as tenements invisible and incorporeal, that is, rents or commons, &c.

Where entry is made upon a lessee for years or a tenant at will, either by a stranger or the lessor, it has been doubted whether restitution could be made, and the lessee, or tenant, put into his possessions again, under the statute of Henry VI.; for the words in that statute which provideth the restitution, are thus: "The said justices, &c., shall *reseize* the lands and tenements, and thereof shall put the party in full possession," &c., which words (lands and tenements) are only to be understood of them that have inheritance, or a freehold at the least. But to this it may be answered, that the said statute hath these words: "Where any do make any forcible entry into lands, tenements, or other possessions," &c., which

word *possessions* extendeth to a lease for years, &c., and the statute is to be expounded upon all the parts thereof together, and not upon one part thereof by itself. *Dalt. Justice*, 424. 1 *Scam. Rep.*, 227.

And yet it was held that a lessee for years, or tenant at will, could not prefer an indictment upon the statute of Henry VI., because he had no freehold; that if he be forcibly put out, and wish to have restitution, the indictment must be made and preferred in the lessor's name, and the jury must find that the lessor is disseized, and the lessee is put out with force; and hereupon the lessor shall have restitution, and then his lessee may re-enter. *Dalt. Justice*, 424. 3 *Bac. Ab.*, 256. 13 *Johns. Rep.*, 343.

So it appears that if a tenant for years, or at will, was forcibly put out by his lessor, he had no remedy under this statute, for he had no freehold, and, therefore, could have no restitution. *Dalt. Justice*, 424.

But the statute of this state is broader than the English statutes. It provides that if the jury shall, by their verdict, find the defendant guilty of having entered into the premises described in the complaint, without right, or of having made a forcible entry, the justice shall give judgment thereon for the plaintiff to have restitution of the premises. He is not required to *re-seize* the party put out or expelled; but it is to restore the possession of the premises to the person to whom they rightfully belong, and from whom they are wrongfully withheld, or to the person who has been forcibly ejected and kept out. *Breese Rep.*, 264. 1 *Scam. Rep.*, 407. 2 *Burn's Justice*, 260.

4. OF THE COMPLAINT, AND WHAT IT SHOULD CONTAIN.

Some of the general rules relative to the complaint in summary proceedings before justices of the peace, have heretofore been considered. *Ante*, 163. But, as the proceedings under the act concerning forcible entries and detainers are, in some respects, peculiar to themselves, some of the rules applicable to them may here be considered with reference to,

1. The parties to the complaint.
2. The description of the premises.
3. The description of the estate of the complainant.

1. *The parties to the complaint.*

By the statutes of 5 and 15 Richard II., the proceedings against forcible entries were by complaint to one or more justices of the peace, and, upon the force being found, the offender was imprisoned in the jail, there to remain until he made fine and ransom. And, by the statute of 8 Henry VI., the justice or justices of the peace, upon making enquiry

as to the force, by a jury of the county, at a *special* sessions by them to be held, and then the force being found by the said jury, the said justice or justices may put the party into his former possession. *Dalt. Justice*, 127. Yet it seems that, if the defendant tendered a traverse of the force, no restitution ought to be made till such traverse be tried. 3 *Bac. Ab.*, 260. *Dalt. Justice*, 440.

By these statutes a double remedy was afforded. The defendant who was found guilty under them, was imprisoned until he made fine to the king for his breach of the peace, and the complainant obtained his rights by being restored to his possession from which he had been expelled.

Our act only furnishes a civil remedy, and the judgment of the justice only restores the party to the possession of the premises from which he has been forcibly ejected. 1 *Scam. Rep.*, 496.

The proceedings under the statute are of a peculiar and anomalous kind. They are of a mixed nature, being in substance, a civil, and in form, a criminal, prosecution. In other states, and in England, the formal parties to the record are the king or the people, on the relation or complaint of the injured party, and the trespasser. 9 *Johns. Rep.*, 156.

By the usual practice in this state, however, the parties to the record in these proceedings are, the complainant as plaintiff, against the trespasser; and this seems to be recognized and approved by the supreme court. 1 *Scam. Rep.*, 407, 495. *Breese Rep.*, 264.

2. *The description of the premises.*

The tenement in which the force was committed must be described with convenient certainty, for otherwise the defendant will not know the particular charge to which he is to make his defence, nor will the sheriff know how to restore the injured party to his possession. *Gale's Stat.*, 313. 1 *Russ. on Crimes*, 290. 3 *Bac. Ab.*, 255.

Thus, a complaint of forcible entry into a tenement, which may signify any thing whatsoever wherein a man may have an estate of freehold, or into a house or tenement, or into two closes of meadow or pasture, or into a rood or half a rood of land, or into certain lands belonging to such a house, or into such a house without showing in what town it lies, or into a tenement with the appurtenances called Truepenny in D., is not good. 1 *Russ. on Crimes*, 290.

But a complaint for an entry into a close called Sergeant Herne's close, without adding the number of acres, is good. 1 *Russ. on Crimes*, 290.

So a complaint containing the following description has been held to be sufficient, to wit: "The premises enclosed by us, situate in the county of Cook, and state of Illinois, being the

same on which you now reside, containing about one hundred acres, more or less, and commonly called North Grove." 1 *Scam. Rep.*, 407.

In this state no indictment or inquisition shall be necessary, in cases arising under the act concerning forcible entries and detainers; but the justice shall set down in writing the complaint under oath, particularly describing the lands, tenements, or possessions in question. *Gale's Stat.*, 313.

And a complaint may be void as to the part thereof only that is uncertain, and good for so much as is certain; thus a complaint for a forcible entry into a house and certain acres of land may be quashed as to the land and stand good as to the house. 3 *Bac. Ab.*, 225.

3. *The description of the estate of the complainant.*

By the statute of 8 Henry VI., providing for a restitution if the traverse jury found the defendant guilty of the force, the justice or justices were required to *re-seize* the lands, &c., and put the party ejected in full possession of the same. 3 *Bac. Ab.*, 250. And the courts, in construing this statute, held that an indictment under it must allege a freehold or *seizin* in somebody, and if it be an entry upon a lessee for years, you must say the entry was made in the freehold of A. in the possession of B., and so he disseized A., and so, of necessity, there must be a disseizin of the freehold laid. 3 *Bac. Ab.*, 256. *Dalt. Justice*, 424. 13 *Johns. Rep.*, 340.

The first two branches of our statute seem to be substantially a copy of the statute of 5 Richard II., providing, however, for restitution, if the defendant should be found guilty of having made entry in any lands, tenements, or other possessions, except where entry is given by law, or of having made such entry by force, instead of imprisonment for the *force*, until the defendant shall make fine according to the English statute.

An indictment under the statute of Richard II., need not show who had the freehold at the time of the force, because it punished the force without regarding the estate the party had on whom it was made; yet, it seems that such indictment ought to show that such entry was made on the possession of some person who had some estate in the tenements, either as of freehold, or as lessee for years, &c., for otherwise it doth not appear that such entry was made injuriously to any one. 3 *Bac. Ab.*, 256.

Where entry is not given by law.

Under our statute, where the complaint is for an entry without lawful right, it is apprehended that the estate of the complainant ought to be set forth with sufficient certainty, so that it may appear that the defendant has been guilty of a violation of the statute, and subject to be turned out of the possession by him illegally obtained. The gist of the action seems to be

that the defendant made entry into the lands, tenements, or other possession of the complainant when it was not given by law, and this requires the complainant to show title in himself, or some one under whom he claims possession, paramount to that of the defendant, or a right of possession superior to that of the defendant.

Upon a traverse of the complaint, the defendant would have a right, it is presumed, to controvert the facts by which the complainant attempts to make out his estate, and may show that he has not such an estate as would enable him to maintain the prosecution. 13 *Johns. Rep.*, 340.

As yet, we have no adjudication whether the defendant can justify his entry by setting up and showing title in himself as a snbstantive matter of defence.

It is presumed, however, that a mere intruder would not be allowed to protect himself in the possession, by setting up an outstanding title in a stranger. 4 *Johns. Rep.*, 203.

The complainant would not be bound, in the first instance, to give precise technical proof that he has a freehold estate, or any lesser estate, entitling him to the possession; any evidence from which either of such estates may be inferred, would be sufficient. 2 *Scam. Rep.*, 251. 13 *Johns. Rep.*, 340.

Prior possession is evidence of a fee, and although the lowest, unless rebutted by higher, it must prevail. *Breese Rep.*, 278. 2 *Bl. Com.*, 195. 2 *Saund.*, 111.

In an action of ejectment, prior possession short of twenty years, under a claim of right, will prevail over a subsequent possession of less than twenty years, when no other evidence of title appears on either side. *Breese Rep.*, 280. And a possession of eight or ten years, under color of right, would be sufficient to recover against a mere intruder. 4 *Johns. Rep.*, 209.

It has been held that a peaceable possession of premises for three years, would be sufficient evidence of title, in an action of ejectment, against the defendant who entered upon the plaintiff without any color of right or title. 2 *Johns. Rep.*, 22.

And it has been held that the mere prior occupancy of land, however recent, gives a good title to the occupier, whereon he may maintain trespass against all the world, except such as can prove an older and better title in themselves. 4 *Taunt.*, 547.

It is, however, to be understood in the cases to which this rule of evidence applies, that the prior possession of the plaintiff had not been voluntarily relinquished without the intention of returning, (as is frequently the case with possession taken by squatters,) and that the subsequent possession of the defendants was acquired by mere entry without any lawful right. 10 *Johns. Rep.*, 355.

In an action of trespass, the possession, where that alone is relied on, must be an actual and not a constructive possession. 1 *Scam. Rep.*, 183. 8 *Cowen Rep.*, 115. 1 *Wend. Rep.*, 466. Yet, it has been held, that proof that the premises were used as

a wood lot for the purposes of fuel and fencing, is sufficient evidence of possession. 14 *Wend. Rep.*, 239.

By "An act to define the extent of possession in cases of settlement on public lands," it is enacted "That hereafter in all actions of trespass, *quare clausum fregit* trespass, and ejectment, and forcible entry and detainer, as well as forcible detainer, only where any person or persons may be settled on any of the public lands in this state, when the same have not been sold by the general government, his, her, or their possession shall, in the absence of paper title, be considered on the trial as extending to the number of acres embraced by the claim of such person or persons, according to the custom of the neighborhood in which such lands may be situated: *Provided*, That such claim shall not exceed in the whole three hundred and twenty acres: *Provided further*, That where the lands have been surveyed, such claim shall not exceed one hundred and sixty acres, and be ascertained by landmarks so plainly made that the same may be designated from the other lands contiguous thereto in the same neighborhood of country: *And provided further*, That such claim shall not be plead or set up in bar of any action, at any time commenced or to be commenced, by a *bona fide* purchaser or purchasers of such lands from the United States, or persons entitled to a right of preemption on the same, under any act of congress now in force, or hereafter to be in force." *Gale's Stat.*, 436.

And by an act supplemental thereto, it is further enacted "That the said act to which this is supplemental shall be construed to mean, and to give to the claimant, the legal possession (for the purposes mentioned in said act) of three hundred and twenty acres (if the custom of the neighborhood extends to that number) of unsurveyed lands, or one hundred and sixty of surveyed lands, whether the same be in one or more separate parcels, and that the claimant shall reside on or near the same; and that the claim of surveyed lands be so plainly marked that it can be designated from the adjacent lands." *Sess. Laws*, 1838–9, *p.* 124.

Where entry is by force.

If any person shall make any entry by force into lands, tenements, or other possessions, although such entry is given by law, he shall be adjudged guilty of a forcible entry and detainer. *Gale's Stat.*, 313.

This statute was passed to restrain persons from violently taking and keeping possession of lands and tenements, although they may have title, and gives to the party ejected a summary remedy to restore him to his former possession. 1 *Scam. Rep.*, 496.

It does not require that the complainant should be seized of a freehold, and, therefore, it is not necessary to set forth in the complaint, or to prove, such an estate; yet, it seems proper, and indeed requisite, that the complainant's estate or interest

in the lands, &c., should be stated truly, so that the court may see that he is entitled to restitution, *Dalt. Justice*, 433. 1 *Caine Rep.*, 125, and that the proof may agree with the complaint. *Ante*, 171. A mere intruder or trespasser could not institute proceedings under the statute, and be restored to the possession which he held unlawfully. 11 *Wend. Rep.*, 158. 3 *Bac. Ab.*, 256. 1 *Caine Rep.*, 126.

Although the defendant, when the proceedings against him are for a forcible entry, cannot set up a paramount title, interest, or claim, to defeat the prosecution, yet he may controvert the facts by which the complainant attempts to prove his estate, for whatever is necessary for him to allege and prove, the defendant may disprove.

And in this case, as well as in the case of an entry where it is not given by law, actual possession will be sufficient to support an allegation of the plaintiff's title, interest, or claim.

But no complaint can warrant an award of restitution, unless it shows that the wrong-doer ousted the party grieved, and, also, continues his possession at the time of exhibiting the complaint; for it is a repugnancy to award restitution of possession to one who never was in possession, and it is vain to award it to one who does not appear to have lost it. 1 *Russ. on Crimes*, 291. *Dalt. Justice*, 433.

Where tenant wilfully holds over.

If any person shall wilfully and without force hold over any lands, tenements, or other possessions after the determination of the time for which such lands, tenements, or other possessions were let to him, or to the person under whom he claims, after demand made in writing for possession thereof by the person entitled to such possession, such person shall be adjudged guilty of a forcible detainer. *Gale's Stat.*, 313.

This act is more comprehensive than the English acts, as it authorizes the action to be maintained against a lessee who holds over after the determination of his lease, whether he holds by force or not, provided the lessor has given written notice to quit. 1 *Scam. Rep.*, 497.

In the case of Wells *v.* Hogan, *Breese Rep.*, 264, which was under this branch of the statute, the complainant stated in his complaint that "he is entitled to the possession of a house and lot in the town of Galena, wherein one Wells lives, and that the said Wells refuses to give possession of said house and lot though he has been notified so to do in writing," which complaint was sworn to, and on the trial before the justices a verdict was found against the defendant below; and on the trial on appeal in the circuit court, Wells was found guilty of a forcible detainer, upon which judgment was rendered. On error to the supreme court, Lockwood, Justice, in delivering the opinion of the court, says, "The complaint made before the justices of the peace was insufficient. The proceedings under the statute for forcible entry and detainer being summary, and

contrary to the course of the common law, must strictly conform to the requisitions of the statute. The complaint is the foundation of the action, and must contain sufficient matter to give the justices jurisdiction, or the whole of the proceedings will be *coram non judice*, and consequently void. In order to justify the justices of the peace in taking jurisdiction of this case, the plaintiff below ought to have stated in his complaint, that the defendant below wilfully and without force held over the premises after the determination of the time for which such premises were let to him, or the person under whom he claims, after demand made in writing for the possession thereof, by the person entitled to such possession; or, in other words, the relation of landlord and tenant should be shown to exist, and a holding over after demand made in writing for a re-delivery of the premises to the landlord. The complaint exhibited to the magistrates states, that the plaintiff below 'is entitled to the possession of a house and lot where the defendant lives,' without showing that the defendant was tenant either to himself, or to any person under whom he claims. This was not sufficient to give the justices jurisdiction of the case." And the judgment below was reversed.

And it has been held that it is not sufficient, in pleading the proceedings before two justices of the peace, in an action for forcible entry and detainer, to aver the complaint was made according to law. The plea should set forth and show, in substance, the facts contained in the complaint, and that it was made under oath. 4 *Scam. Rep.*, 85.

5. OF THE PROCEEDINGS UNDER THE STATUTES.

By sec. 1 of the act of February 28, 1837, it is enacted "That hereafter in all cases of forcible entry and detainer or forcible detainer only, any justice of the peace shall have jurisdiction of any case arising under the act to which this is amendatory, upon oath of the party aggrieved, or his authorized agent." *Gale's Stat.*, 314.

On complaint upon oath of the party grieved, or his authorized agent, the justice shall isssue his summons directed to the sheriff (or coroner, if the sheriff be interested) of his county, commanding him to summon the person against whom the complaint is made, to appear before such justice, at a time and place to be stated in such summons, not more than twelve, nor less than six days from the time of issuing such summons, and which shall be served at least five days before the return day thereof, by reading the same to the defendant, or leaving a copy at his place of abode; and the said justice shall also, at the same time, issue a precept to the sheriff or coroner, commanding him to summon a jury of twelve good and lawful men of the county, to appear before him, at the return of the summons, to hear and try the said complaint. And if any part

of the jurors shall fail to attend, or be challenged, the said justice may order the sheriff or coroner to complete the number by summoning and returning others forthwith. *Gale's Stat.*, 313–14.

By sec. 3 of the act of February 2, 1827, it is provided that "The sheriff or coroner shall return to the said justice the summons and precept as aforesaid, on the day assigned for trial, and shall state on the back of said summons how the same was served, and on the back of said precept, a list of the names of the jurors. And if the defendant does not appear, the justices shall proceed to try the said cause, *ex parte*, or may, in their discretion, postpone the trial for a time not exceeding ten days; and the said justices shall also issue subpœnas for witnesses, and proceed in the trial of said cause, as in other cases of trial by jury.

"Sec. 4. No indictment or inquisition shall be necessary in any case arising under this act; but the justices shall set down in writing the complaint, under oath, particularly describing the lands, tenements, or possessions in question, and shall keep a record of the proceedings had before them; and if the jury shall find the defendant guilty, they shall give judgment thereon, for the plaintiff to have restitution of the premises and his costs, and shall award their writ of restitution; and if a verdict be given for the defendant, judgment shall be given against the plaintiff for costs and execution issue therefor."

By sec. 2 of an act of February 28, 1837, it is provided that "Either party feeling aggrieved by the verdict of the jury or the decision of the justice on any trial had under this act, he or she or they, may have an appeal to the circuit court to be obtained in the same manner as appeals from justices of the peace in other cases, *Provided*, That the appellant or appellants shall also insert in the appeal bond, a clause conditioned for the payment of all rents becoming due if any from the commencement of the suit until the final determination thereof, as provided in the second section of an act concerning landlords and tenants, approved February 13, 1827." *Gale's Stat.*, 314.

By sec. 2 of "An act concerning landlords and tenants," it is provided that, "If any tenant or tenants for life, lives or for years, or any person or persons, who are or shall come into possession of any lands, tenements or hereditaments, by, from or under, or by collusion with such tenant or tenants, shall wilfully hold over any lands, tenements or hereditaments, after the expiration of such term or terms, and after demand made, and notice in writing given, for the possession thereof, by his, her or their landlord or landlords, lessor or lessors, or the person or persons to whom the remainder or reversion of such lands, tenements or hereditaments shall belong, such person or persons so holding over, shall for the time such landlord or rightful owner, be so kept out of possession, pay to the person or persons so kept out of possession, or their legal representa-

tives at the rate of double the yearly value of the lands, tenements or hereditaments so detained, as aforesaid, to be recovered by action of debt or otherwise, in any court having recognizance of the same." *Gale's Stat.*, 435.

This statute makes no provision for amending a bond where it is defective. And a motion to amend it is addressed to the sound discretion of the court, and cannot be assigned for error. 2 *Scam. Rep.*, 65.

By sec. 5 of the act of February 2, 1827, it is provided that, "If the appeal be taken within five days after the trial had before the justices, no writ of restitution or execution shall be issued by them; and the circuit court, on giving judgment for the plaintiff, shall award a writ of restitution and execution for costs, including the costs before the justices; and if judgment be for the defendant, he shall recover costs, in like manner, and have execution for the same." *Gale's Stat.*, 314.

FORMS OF PROCEEDINGS FOR FORCIBLE ENTRY AND DETAINER.

Form of complaint for an entry without force.

State of Illinois, }
La Salle county, } ss. The complaint of A. B. of *Eagle precinct*, in said county, who being duly sworn, upon his oath gives *William McCormick*, Esquire, one of the justices of the peace of said county, to understand and be informed, that C. D., on the day of 18 at *Eagle* precinct, in the county aforesaid, did unlawfully enter into the lands (or "tenements") and possessions of the complainant there situate, known and designated as follows, to wit: (describe the land,) and then and there did unlawfully put out and expel the complainant from his said lands (or "tenements") and possessions, wherein this complainant had at the time aforesaid an estate of freehold then and still subsisting; (or "was possessed of a certain term of years then and still to come, and unexpired," or "been in quiet and peaceable possession for the space of *eight* years preceding, and that his interest therein still subsists;") and the said C. D. still doth hold and detain the said lands (or "tenements") and possessions from the said complainant unlawfully and without right, contrary to the form of the statute in such case made and provided; therefore, he prays that the said C. D. may be summoned to answer this complaint.

A. B.

Subscribed and sworn before me, the day of 18 *William McCormick*, Justice of the peace.

Form of a complaint for a forcible entry.

State of Illinois, }
La Salle county, } ss. The complaint of A. B. of *Eagle*

precinct, in the said county, who being duly sworn, upon his oath gives *William McCormick*, Esquire, one of the justices of the peace in said county, to understand and be informed, that C. D., on the day of 18 at *Eagle* precinct, in said county, did unlawfully make a forcible entry into the lands (or "tenements") and possessions of this complainant there situate and known and designated as follows, to wit: (insert the description,) and then and there with strong hand and multitude of people, did violently, forcibly, and unlawfully eject and expel the complainant from the said lands (or "tenements") and possessions, wherein this complainant had, at the time aforesaid, an estate of freehold then and still subsisting; (or "was possessed of a certain term of years, then and still to come, and unexpired," or "been in the quiet and peaceable possession for the space of *six* months then next preceding;") and that the said C. D. still doth hold and detain the said lands (or "tenements") and possessions from the said A. B. unlawfully, forcibly, and with strong hand, against the form of the statute in such case made and provided; therefore, he prays that the said C. D. may be summoned to answer to the said complaint. A. B.

Sworn and subscribed before me, this day of 18 *William McCormick*, Justice of the peace.

Form of demand of possession.

To Mr. C. D.:

Sir: Take notice, that I hereby demand that you quit and immediately deliver up possession of the lands (or "tenements") and possessions which you now hold of me, situate in *Eagle* precinct, in the county of *La Salle*, being the same now occupied by you. Mr. E. F. is hereby authorized to receive possession of said land for me. Dated the day of 18 Yours, &c. A. B.

To the like, by an agent.

To Mr. C. D.:

Sir: Take notice, that I do hereby, as the agent for, and on behalf of, your landlord, A. B., of demand that you quit, and immediately deliver up possession of the lands (or "tenements") and possessions which you now hold of the said A. B., situate in *Eagle* precinct, in *La Salle* county, being the same on which you now reside. Dated the day of 18 Yours, &c. G. H.,
Agent for the said A. B.

Form of complaint for a forcible detainer.

State of Illinois, *La Salle* county, ss. The complaint of A. B. of *Eagle*

precinct in said county, who being duly sworn, upon his oath gives *William McCormick*, Esquire, a justice of the peace of said county, to understand and be informed, that on or about the day of 18 he did demise and lease to C. D., of the place aforesaid, all that certain farm (or "messuage") situate in *Eagle* precinct, in the county aforesaid, known and designated as follows: (describe the premises,) for and during the term of one year from the said day of 18 and that the said C. D., wilfully and without force, after the expiration of the said lease, held over, and still continues in the possession of the premises without the permission of this complainant, notwithstanding demand has been made in writing by this complainant upon the said C. D., to quit and deliver up possession thereof to him; therefore, he prays that the said C. D. may be summoned to answer to the said complaint.

A. B.

Subscribed and sworn before me, this day of 18 *William McCormick*, Justice of the peace.

Form of traverse.

C. D. *ads.* A. B. } And the said C. D. having had the said complaint read to him, says that he is not guilty of the matters set forth therein, and of this he puts himself upon the country, &c.

It is not necessary that this traverse should be in writing, as the statute does not require it. 4 *Johns. Rep.*, 199.

Form of summons:

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to the sheriff of the said county:

Whereas, complaint has been made before *William McCormick*, Esquire, one of the justices of the peace of said county, that C. D., on the day of 18 at *Eagle* precinct, in the county aforesaid, did unlawfully enter into the lands and possessions of A. B., there situate and known and designated as follows, to wit: (describe the premises,) and then and there did unlawfully put out and expel the said A. B. from his said lands and possessions, wherein he had been in the quiet and peaceable possession for the space of *eight* years preceding, and that his interest therein still subsists, and that the said C. D. still doth hold and detain the said lands and possessions from the said A. B. unlawfully and without right, (or, if for any other cause, set it forth as in the complaint.)

We, therefore, command you to summon the said C. D. to

appear before the said justice, at his office in *Eagle* precinct, in said county, on the day of *instant*, at o'clock in the noon, to answer the said complaint. And have you then and there this precept. Hereof fail not at your peril.

Given under the hand and seal of the said justice, the day of 18 *William McCormick.* [L. S.]

Form of a return by the sheriff to be endorsed, &c.

Personally served, October 23d, 1844, by reading to the within named defendant. *William Reddick*, Sheriff.

Another form.

Served, October 23d, 1844, by leaving a copy at the last place of abode of the within named defendant.

William Reddick, Sheriff.

Form of a subpœna.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to I. J., K. L., M. N., and O. P.:

You, and each of you, are hereby required to be and appear before *William McCormick*, Esquire, one of the justices of the peace of the said county, at his office in *Eagle* precinct, in said county, on the day of *instant*, at o'clock in the noon, to testify the truth, according to your knowledge, touching a certain complaint made and exhibited by A. B., before the said justice, against C. D., for a forcible entry and detainer, (or "detainer,") and for which the said C. D. is then and there to be tried; on the part of the complainant, (or "on the part of the defendant.")

Given under the hand and seal of the said justice, the day of 18 *William McCormick.* [L. S.]

There may be four witnesses put in one subpœna.

Form of precept for summoning a jury.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to the sheriff of the said county:

We command you to summon twelve good and lawful men of your county, who are in no wise of kin to A. B. or C. D., to appear before *William McCormick*, Esquire, one of the justices of the peace in said county, at his office in *Eagle* precinct, in said county, on the day of *instant*, at o'clock in the noon, to make a jury, upon their oaths to hear and try the traverse of the complaint of the said A. B., and now

pending before the said justice against the said C. D., for a forcible entry and detainer, (or "detainer,") against the form of the statute in such case made and provided; and that you make a list of the persons summoned, and certify the same on the back of this precept, and make return hereof to the said justice.

Given under the hand and seal of the said justice, the day of 18 *William McCormick.* [L. S.]

Juror's oath upon the traverse.

You, and each of you, do swear, in the presence of the ever living God, that you will well and truly hear, try, and determine this issue of traverse between A. B., the complainant, and C. D., the defendant, and a true verdict give according to evidence. So help you God.

Form of affirmation.

You, and each of you, do solemnly, sincerely, and truly declare and affirm, that you will well and truly hear, try, and determine this issue of traverse between A. B., the complainant, and C. D., the defendant, and a true verdict give according to evidence. And this you do under the pains and penalties of perjury.

It is usual to swear four jurors at a time.

Form of oath of witness.

You do swear, in the presence of the ever living God, (or, "You do solemnly, sincerely, and truly declare and affirm,") that the evidence which you shall give upon this issue of traverse, between A. B., the complainant, and C. D., defendant, shall be the truth, the whole truth, and nothing but the truth. So help you God, (or, "This you will do under the pains and penalties of perjury.")

The verdict of the jury should be, "We find the defendant guilty in manner and form as stated in complaint," or, "We find the defendant not guilty."

Form of record of the proceedings.

A. B. *vs.* C. D. } *La Salle* county, *ss.* Be it remembered, that on the day of 18 at *Eagle* precinct, in said county, A. B. complains to me, *William McCormick*, Esquire, one of the justices of the peace in and for the said county, (what follows in brackets must correspond with the charge in the complaint,) [that C. D., on the day of

18 at *Eagle* precinct, in the county of *La Salle*, did unlawfully enter into the lands and possessions of the said A. B., there situate, and known and designated as follows, to wit: (insert the description:) and then and there did unlawfully put out and expel the complainant from his said lands and possessions, wherein the said A. B. had been in the quiet and peaceable possession for the space of *eight* years preceding, and that his interest therein still subsists, and that the said C. D. still doth hold and detain the said lands and possessions from the said A. B., unlawfully and without right:

Whereupon the said A. B., on the day of 18 prayed of me, being a justice as aforesaid, to issue a summons in this behalf, and I, having heard the said complaint and prayer, did thereupon issue a summons, in the name of the people of the state of Illinois, directed to the sheriff of said county, requiring him to summon the said C. D. to appear before me, at my office in *Eagle* precinct, on the day of 18 at o'clock in the noon, which was duly returned with an endorsement thereon signed by the said sheriff, as follows, "Personally served, October 23d, 1844, by reading to the within named C. D.;" and, on the said day of 18 I issued a precept for a jury to the said sheriff, commanding him to summon a jury of twelve good and lawful men of the county, to appear before me at the return of the said summons to hear and try the said complaint, which was returned by the said sheriff with a list of the names of the jurors on the back thereof, and certified by him.

And, on the day of 18 in pursuance of the said summons, personally appeared before me as well the said C. D. as the said A. B.; and the said complaint having been read to the said C. D., he said that he was not guilty of the matters set forth therein.

And the jurors of the jury summoned as aforesaid, having been called, tried, and sworn, did sit together before me and hear the proofs and allegations of said parties which were delivered publicly in their presence.

And after hearing the said proofs and allegations, the jury were kept together in a convenient place, by the said sheriff, until they had agreed on their verdict.(*a*) And the said jury,

(*a*) If the verdict is for the defendant, then say, "And the said jury having agreed on their verdict, came into court and delivered the same publicly, and thereby found the said C. D. not guilty. It is, therefore, considered that the said C. D. recover against the said A. B. the sum of dollars, for his costs and charges by him laid out and expended in his defence in this behalf, according to the form of the statute in such case made and provided, and that he have execution therefor. In testimony whereof, &c.

having agreed on their verdict, came into court and delivered the same publicly, and thereby found the said C. D. guilty in manner and form as set forth in the complaint.

It is, therefore, considered by me, the said justice, that the said A. B. recover and be restored to the possession of the lands and possessions particularly described and designated in said complaint, and that he have a writ of restitution therefor. And it is further considered, that he recover against the said C. D. the sum of dollars, for his costs and charges by him laid out and expended in and about the prosecution of this suit, according to the form of the statute in such case made and provided, and that he have execution therefor.

In testimony whereof, I, the said *William McCormick*, have hereunto set my hand and seal, at *Eagle* precinct, in the county of *La Salle*, the day of 18

William McCormick. [L. S.]

Form of writ of restitution.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to the sheriff of the said county:

Whereas, A. B. lately exhibited his complaint, under oath, in writing, before *William McCormick*, Esquire, one of the justices of the peace of said county, that (set out the charge as in the complaint,) and prayed that the said justice issue a summons in that behalf; whereupon the said justice issued a summons, directed to the sheriff, requiring him to summon the said C. D. to appear before the said justice, on the day of 18 and at the same time issued a precept to the sheriff, commanding him to summon a jury to appear before him at the same time and place, on which day the said C. D. appeared before the said justice and traversed the said complaint; and the jury being sworn, after hearing the proofs and allegations of the parties, found the said C. D. guilty; whereupon it was considered by the said justice, that the said A. B. be restored to the possession of the said lands and possessions, and have a writ of restitution therefor. And it was further considered by the said justice, that the said A. B. recover against the said C. D. the sum of dollars, for his costs and charges by him laid out and expended in and about the prosecution of said suit, as appears to us by the record of the said justice.

We, therefore, command you to go to the said premises, without delay, taking with you the power of the county, if necessary, and to cause the said A. B. to be restored and put into full possession of the said lands (or "tenements") and possessions, according to his estate and right therein before the said entry, (or "detainer,") in pursuance of the statute in such case made and provided.

And we also command you to levy of the goods and chattels of the said C. D., in your county, the said sum of dollars, which was adjudged to the said A. B. for his costs and charges aforesaid, whereof the said C. D. is convicted, as appears to us by the said record; and that you make return of what you shall do hereon with all convenient speed.

Given under the hand and seal of the said justice, the day of 18 *William McCormick.* [L. S.]

Form of execution for costs against the complainant.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to the sheriff of the said county:

Whereas, A. B. lately exhibited his complaint, under oath, in writing, before *William McCormick*, Esquire, one of the justices of the peace of the said county, against C. D., for a forcible entry and detainer; whereupon the said C. D. was summoned and appeared before the said justice, on the day of 18 and traversed the said complaint, and the jury for that purpose duly summoned and sworn, after hearing the proofs and allegations of the parties, by their verdict found the said C. D. not guilty; whereupon it was considered, by the said justice, that the said C. D. recover against the said A. B. the sum of dollars, for his costs and charges by him laid out and expended in and about his defence in this behalf, as appears to us by the record of the said justice:

We, therefore, command you, that of the goods and chattels of the said A. B., in your county, you levy the sum of dollars, for his costs and charges by the said C. D. laid out and expended as aforesaid. And do you make return of what you shall do hereon with all convenient speed.

Given under the hand and seal of the said justice, the day of 18 *William McCormick.* [L. S.]

CHAPTER XII.

INCLOSURES.

By the common law every man's land is, in the eye of the law, inclosed and set apart from his neighbor's; and that either by a visible and material fence, as one field is divided from another by a hedge, or by an ideal invisible boundary, existing only in contemplation of law, as when one man's land adjoins to another's in the same field. 3 *Bl. Com.*, 209.

The owner or occupier of a close was not obliged to fence against an adjoining close, unless by force of prescription, but he was at his peril to keep his cattle on his own close, and to prevent them from escaping. 6 *Mass. Rep.*, 94.

By sec. 3 of "An act regulating inclosures," it is enacted that, "For the better ascertaining and regulating of partition fences, it is hereby directed, that when any neighbors shall improve lands adjacent to each other, or when any person shall inclose any land adjoining to another's land already fenced, so that any part of the first person's fence becomes the partition fence between them, in both these cases the charge of such division fence, (so far as inclosed on both sides,) shall be equally borne and maintained by both parties to which, and other ends in this law mentioned, the county commissioners, yearly, and every year in the term next after the month of January, shall nominate, and are hereby required to nominate and appoint three honest, able men, for each township, who being duly sworn to the faithful discharge of the duties of their appointment, shall proceed, at the request of any person or persons feeling him or themselves aggrieved, to view all such fence and fences, about which any difference may happen or arise; and the aforesaid persons, or any two of them, in each township respectively, shall be the sole judges of the charge to be borne by the delinquent, or by both or either party, and of the sufficiency of all fences, whether partition fences or others; and when they shall judge any fence to be insufficient, they shall give notice thereof to the owners or possessors, and if any one of the owners or possessors, upon request of the other, and due notice given by the said viewers, shall refuse or neglect to make or repair the said fence or fences, or to pay the moiety of the charges of any fence before made, being the division or common fence, within twenty days after notice given, then, upon proof thereof before two justices of the peace of the respective county, it shall be lawful for the said justices to order the person aggrieved and suffering thereby, to make or

repair the said fence or fences, who shall be reimbursed his costs and charges from the person so refusing or neglecting to make or repair the partition fence or fences aforesaid, or to order the delinquent to pay the moiety of the charge of the fence before made, being a division or common fence, as the case may be; and if the delinquent shall neglect or refuse to pay the party injured the moiety of the charge of any fence before made, or to reimburse the costs and charges of making or repairing the said fence or fences, under the order aforesaid, then the same shall be levied upon the delinquent's goods and chattels, under warrant from a justice of the peace, by distress and sale thereof, the overplus, if any, to be returned to the said delinquent: *Provided*, That nothing herein contained shall be intended to prevent or debar any person or persons from inclosing his or their grounds, in manner they please, with sufficient walls or fences of timber, other than those heretofore mentioned, or by dykes, hedges, and ditches, all such walls and fences to be in height at least five feet from the ground; and all dykes to be at least three feet in height from the bottom of the ditch, and planted and set with thorn, and other quickset, so that such inclosure shall fully answer and secure the several purposes meant to be answered and secured by this law: *Provided*, *also*, That such walls or fences of timber, other than those heretofore mentioned, and dykes, hedges, and ditches, shall be subject to all provisions, inspections, and restrictions, to which, by this law, any other inclosure or fence is made liable according to the true intent and meaning hereof. *Gale's Stat.*, 277.

Under this statute it is apprehended that, before a party can be made liable for the making or repairing of a partition fence, the proportion which he is bound to make or repair, ought to be either agreed upon or assigned, pursuant to the statute. Until this is done the obligation is undefined. The respective occupiers of two closes adjoining are bound to make and maintain each one half of the partition fence, but, unless the fence, or the line on which it is to be made, has been divided by agreement between the parties, or assigned pursuant to the statute, or by prescription, neither party is obliged to maintain any part of the partition fence. 6 *Mass. Rep.*, 100. And indeed, if there exists in such case a joint obligation to make the fence, no legal effect would flow from it; for then each party would be bound equally to make every part, and if the fence be defective, each party would be chargeable with the deficiency; and upon the escape of cattle from either close to the other, through a defect in any part of the fence, the owner of the cattle could not allege the escape to be from the deficiency of the other's fence. 6 *Mass. Rep.*, 101. 19 *Johns. Rep.*, 385.

In Massachusetts and New York it has been held that an

agreement, settling the proportions of the partition fence, would, doubtless, have the same effect as an assignment under the statute; though, in order to be effectual, it must be made between the parties to the suit, or those under whom they claim. 4 *Johns. Rep.*, 414. 6 *Mass. Rep.*, 96. Ch. Justice Parsons, in speaking of these agreements, says, that, "When there has been no assignment, but only an agreement executed by the tenants of the adjoining closes, it may be a question whether such agreement shall have the force of an assignment, and if not, whether the tenant, whose cattle have escaped, can plead such agreement in bar of an action of trespass, or must have his remedy by an action on the agreement. It is true, that a *curia claudenda* does not lie but against a tenant, who is obliged by *prescription* to repair. And, by analogy, an agreement between the tenants making a division of the fence, each one mutually undertaking to repair his part, would not authorise one tenant, who had made or repaired the fence of the other, on his refusal, to recover of him the expense. But there appears to be no good reason, after an actual division by such agreement, if the cattle of one tenant escape into the close of the other tenant, through the defect of the fence, which the other had agreed to make and repair, why the owner of the cattle might not aver, that the party complaining had bound himself by his agreement to make and maintain the fence, and that the cattle escaped through his default; for if he had agreed to make and repair the fence, he ought, by law, to fulfil his agreement. Prescription to fence is allowed at the common law, as resulting from an original grant or agreement, the evidence of which is lost by the lapse of time; and it is reasonable that the agreement produced should be as effectual as a presumption that it once existed, but is lost, arising from ancient usage." 6 *Mass. Rep.*, 97. And it has been determined in New York, that where the party has, for several years, kept up a certain part of the division fence as his own, this is, *prima facie*, enough to show that it belongs to him. 15 *Johns. Rep.*, 220. 1 *Cowen's Rep.*, 82, *note a.*

Agreement to divide partition fence.

On this day of in the year of our Lord one thousand eight hundred, &c., it is agreed by and between A. B., of the county of and state of Illinois, of the one part, and C. D., of said county, of the other part, as follows, viz:

Whereas, the said A. B. has heretofore erected a fence on the division line between his lands and the lands of the said C. D., [which said fence commences at the south east corner of the north east quarter of section ten, in township thirty three, north range, east of the principal meridian, and runs north, on the line of said section, eighty rods;] and

whereas, after the erection of said fence, the said C. D. inclosed a field on the east side of said division line, so that sixty rods of said fence, commencing at the said south east corner, has become, and now is, a partition fence between the fields of the said A. B. and C. D; and whereas, the said C. D. has paid to the said A. B. one half of the expense of building said sixty rods of fence. It is, therefore, now agreed between the parties hereto, that the thirty rods on the north part of the said sixty rods, shall be well and sufficiently maintained and kept in repair by the said A. B., and the remainder of said sixty rods shall be kept in like repair by the said C. D.

In witness whereof, we have hereto set our hands and seals the day and year aforesaid.

A. B. [L. S.]
Executed and delivered in the presence of } C. D. [L. S.]

Another form.

On this day of 18 in the year of our Lord one thousand eight hundred, &c., it is agreed by and between A. B. of the county of and state of Illinois, of the one part, and C. D., of said county, of the other part, as follows, viz:

Whereas, the said A. B. has improved lands on the north half of the east half of section one, in township north range, east of the principal meridian, and the said C. D. has improved lands on the south half of said tract; and whereas, it is contemplated to erect a partition fence along the whole length of the line, dividing said tract into north and south halves, the distance being eighty rods. It is, therefore, agreed by and between the parties, that each shall bear an equal half of the expense of erecting said fence, and, after the same shall have been completed, that A. B. shall well and sufficiently maintain and keep in repair the east half of said fence, and that the said C. D. shall well and sufficiently maintain and keep in repair the west half of said fence.

In witness whereof, &c., (as in above form.)

A. B. [L. S.]
Executed and delivered in the presence of } C. D. [L. S.]

Form of request to viewers to assign, where a partition fence is jointly owned.

To E. F., G. H., and I. J., fence viewers of township number, &c., in the county of *La Salle*:

GENT.: A difference has arisen between me, the subscriber, and C. D., my neighbor, relative to a partition fence jointly owned by us, and on the dividing line between our adjoining lands, so far as the same are inclosed on both sides of

said line. The said fence commences, &c. (Here describe partition fence accurately.)

Therefore, I do request you to proceed to and view the same, and assign to each of us our respective parts of said fence to be by us maintained and kept in repair in future.

Dated, on this day of 18 A. B.

Form of notice to opposite party of the above request, and of the meeting of viewers.

To Mr. C. D.:

Whereas, it has been represented to us, the subscribers, fence viewers of township number, &c., in the county of *La Salle*, that a difference has arisen between you and A. B., your neighbor, relative to the partition fence jointly owned by you and the said A. B., and on the dividing line between your adjoining lands, so far as the same are inclosed on both sides of said line. The said fence commences, &c. (Here describe fence as in request.)

And whereas, we have been requested by the said A. B. to view the same, and to assign to you and the said A. B. your respective parts of the said fence, to be by each of you maintained and kept in repair in future.

You are, therefore, notified, that we shall, on the day of 18 at o'clock, A. M., proceed to view the said fence and consider of the said request.

Yours, &c., E. F.
G. H.
I. J.

Decision of fence viewers assigning the respective parts of a joint partition fence.

State of Illinois, }
La Salle county, } ss. Whereas, on the day of 18 it was represented to us, the subscribers, fence viewers of township number, &c., in said county, that a difference had arisen between A. B., and C. D. his neighbor, relative to the partition fence jointly owned by them and on the dividing line between their adjoining lands, so far as the same are inclosed on both sides of the said line. The said fence commences, &c. (Describe the fence as in request.) And whereas, we were requested by the said A. B. to proceed to and view the said partition fence, and to assign to the said A. B. and C. D. their respective parts of said fence, to be by them respectively maintained and kept in repair:

Therefore, we, the said fence viewers, having met pursuant to the said request and notice, and it being satisfactorily proved to us that the said C. D. has had due notice of the time of viewing the said fence, we proceeded, on the day of

last, to view the said fence, in the presence of the said A. B. and C. D., (or "said C. D. not being present,") and having heard the statements and allegations of the parties, (or "of the said A. B.,") we assign to the said A. B. the *north* half of the said fence, and to the said C. D. the *south* half thereof, to be by them respectively maintained and kept in repair in future.

Given under our hands and seals, this day of 18

E. F. [L. S.]
G. H. [L. S.]
I. J. [L. S.]

Form of request to viewers, &c., where fence has been made.

To E. F., G. H., and I. J., fence viewers for township number in the county of *La Salle*:

GENT.: A difference has arisen between me, the subscriber, and C. D., who is a neighbor to me, relative to a partition fence made by me upon the division line between our adjoining lands in said township, before the said C. D. had inclosed his land, so far as our lands are now inclosed on both sides of said line, viz: (describe the fence and its location particularly:)

Therefore, I do hereby request you to proceed to and view the said partition fence between our said lands, and judge of and determine the charges to be borne by the said C. D., as well as by myself, for the making of said fence, and for maintaining and keeping the same in repair in future.

Dated, the day of 18 Yours, &c. A. B.

As these viewers are, by the statute, made the *sole* judges of the charge to be borne by the delinquent, or by both, or either party, and of the sufficiency of all fences, it seems proper that notice should be given to the opposite party of the proceedings, and the time when the viewers will proceed to view the fence, and judge as to the sufficiency thereof, and the charges to be borne by both or either of the parties. *Ante*, 173.

Notice to the opposite party, where fence has been made.

To Mr. C. D.:

Whereas, it has been represented to us, the subscribers, fence viewers of township in *La Salle* county, that a difference has arisen between you and A. B., relative to a partition fence made by the said A. B. upon the division line between your and his adjoining lands before you had inclosed your lands, so far as said lands are now inclosed on both sides of the said line, viz: (describe the fence as in the request:)

And whereas, we have been requested by the said A. B. to proceed to and view the said partition fence, and judge of and determine the charge to be borne by you, the said C. D., as well as by the said A. B., for the making of the said fence, and for the future maintaining and keeping the same in repair.

We, therefore, do hereby give you, the said C. D., notice that, on the day of *instant*, at o'clock in the noon, we will proceed to view said fence and to consider of said request.

Dated, this day of 18

E. F. [L. S.]
G. H. [L. S.]
I. J. [L. S.]

Form of viewers' decision where fence has been made, &c.

State of Illinois, }
La Salle county, } ss. Whereas, on the day of 18 it was represented to us, the subscribers, fence viewers for township in the said county, by A. B., that a difference had arisen between him and C. D., his neighbor, relative to a partition fence made by him, the said A. B., upon the division line between their adjoining lands in the said township, before the said C. D. had inclosed his land, so far as their said lands are now inclosed on both sides of the said line, viz: (describe the division line as in the request:)

And whereas, we were at the same time requested by the said A. B. to proceed to and view the said partition fence, and judge of and determine the charges to be borne by the said C .D., as well as by the said A. B., for the making of the said fence, and for maintaining and keeping the same in repair in future:

And whereas, we did thereupon notify the said C. D. that, on the day of 18 at o'clock in the noon, we would proceed to view the said partition fence and consider of said request:

Therefore, we, the said fence viewers, having met pursuant to the said request and notice, and it being satisfactorily proved to us by the affidavit of R. S. that the said notice was duly served upon the said C. D., on the day of 18 and we, having viewed the said partition fence in the presence of the said A. B. and C. D., and having heard the statements and allegations of the said parties, do consider, that said C. D. ought to pay to the said A. B. the moiety of the costs and charges of building the same, and that, in future, the said A. B. shall maintain and keep in repair the *north* half thereof, and that the said C. D. shall maintain and keep in repair the *south* half thereof.

Given under our hands and seals, the day of 18

E. F. [L. S.]
G. H. [L. S.]
I. J. [L. S.]

Form of request to comply with the decision of fence viewers where the fence has been made by one party.

To Mr. C. D.:

Sir: Whereas, E. F., G. H., and I. J., fence viewers of township number, &c., did this day (or "on the day of," &c.) view the partition fence between our adjacent lands, (here describe the fence as in request,) and after viewing the same, considered it to be sufficient, and that you ought to pay the moiety of the costs and charges of building it; you are, therefore, hereby requested to do the same. The following is a bill of items, to wit:

1844.

Jan. 2*d.* To one-half of 2000 rails, at $ per hundred . . . . . $

" 9. To one-half of the expense of hauling and laying up the same . . . .

Dated, this day of 1844. $

Yours, &c A. B.

Form of request to the viewers, &c., where there is no fence.

To E. F., G. H., and I. J., fence viewers for township in the county of *La Salle:*

Gent.: A difference has arisen between me, the subscriber, and C. D., who is my neighbor, relative to making a partition fence upon the division line between our adjacent lands in the said township, so far as our lands are inclosed on both sides of the said line, viz: (describe particularly the line upon which it is desired the fence should be made:)

Therefore, I do hereby request you to proceed to, and view, the said division line between our said lands, and judge of and determine what proportion, and which part, of the fence to be made on said line, shall be made, maintained, and kept in repair, and be a charge to be borne by the said C. D., as well as what proportion and which part of the fence to be made on said line shall be made, maintained, and kept in repair by myself, and be a charge to be borne by me.

Dated, the day of 18 Yours, &c.

A. B.

Notice to the opposite party, where there is no fence.

To Mr. C. D.:

Whereas, it has been represented to us, the subscribers, fence viewers of township in *La Salle* county, that a difference has arisen between you and A. B. relative to making a partition fence upon the division line between your lands and the lands of A. B. adjacent thereto,

all situated in the said township, (describe the division line as in the request:)

And whereas, we have been requested by the said A. B. to proceed to and view the said division line, and judge of and determine what proportion, and which part, of the fence to be made on said line, shall be made, maintained, and kept in repair, and be a charge to be borne by you, the said C. D., as well as what proportion, and which part, of said fence to be made on said line, shall be made, maintained, and kept in repair by the said A. B., and be a charge to be borne by him:

We, therefore, do hereby give you, the said C. D., notice that, on the day of *instant*, at o'clock in the noon, we will proceed to view the said division line, and to consider of said request.

Dated, the day of 18 Yours, &c.

E. F.
G. H.
I. J.

Form of viewers' decision where no fence has been made.

State of Illinois, }
La Salle county, } ss. Whereas, on the day of 18 it was represented to us, the subscribers, fence viewers for township in the said county, by A. B., that a difference had arisen between him and C. D., his neighbor, relative to making a partition fence upon the division line between their adjacent lands in said township, so far as their said lands were inclosed on both sides of the said line, viz: (describe the division line as in request:)

And whereas, we were at the same time requested by the said A. B. to proceed to, and view, the said division line, and judge of and determine what proportion, and which part, of the fence to be made on said line should be made, maintained, and kept in repair, and be a charge to be borne by the said C. D., as well as what proportion and which part of said fence, to be made on said line, shall be made, maintained, and kept in repair, and be a charge to be borne by the said A. B.; and whereas, we did thereupon notify the said C. D. of the said representation and request of the said A. B., and did further notify him that, on the day of *instant*, at o'clock in the noon, we would proceed to view said fence, and to consider of the said request:

Therefore, we, the said fence viewers, having met pursuant to the said request and notice, and it being satisfactorily proved to us, by the affidavit of R. S., that the said notice was duly served upon the said C. D., on the day of 18 and we having viewed the said division line in the presence of the said A. B. and the said C. D., (or "the said C. D. not appearing,") and having heard the statements and

allegations of the said parties, (or "of A. B.,") do adjudge and determine that the *north* half of the partition fence to be made on the said division line, shall be made, maintained, and kept in repair, and be a charge to be borne by the said C. D.; and that the *south* half of the said partition fence, to be made on said division line, shall be made, maintained, and kept in repair, and be a charge to be borne by the said A. B.

Given under our hands and seals, the day of 18

E. F. [L. S.]
G. H. [L. S.]
I. J. [L. S.]

Form of request to make fence in conformity to the decision of fence viewers.

To Mr. C. D.:

SIR: I hereby request you to make that part and proportion of the partition fence on the division line between our adjoining lands, adjudged and determined, on the day of 18 by E. F., G. H., and I. J., fence viewers, to be made and maintained, and be a charge to be borne by you; of which decision the said fence viewers have notified you.

Dated, the day of 18 Yours, &c.

A. B.

Form of request to viewers, when the half of the fence that had been previously assigned is insufficient.

To E. F., G. H., and I. J., fence viewers of township number in the county of *La Salle:*

GENT.: A difference has arisen between me, the subscriber, and C. D., my neighbor, relative to the sufficiency of the *north* half of the partition fence between our adjacent lands, that being the part heretofore assigned by the fence viewers of said township to said C. D. The said partition fence commences at the *south-east*, corner of section, &c., and runs *north* on the line *eighty* rods, (or as the case may be.)

You are, therefore, hereby requested to view the said fence, and judge and determine whether the *north* half is sufficient.

Dated, the day 18 A. B.

Notice to the opposite party, when that part of the fence assigned to him is insufficient.

To Mr. C. D.:

Whereas, it has been represented to us, the subscribers, fence viewers of township in *La Salle* county, that a difference has arisen between you and A. B., relative to the sufficiency of that part of the partition fence assigned to you on the division line between your and his

adjoining lands in said township, (describe the fence as in the request.)

And whereas, we have been requested by the said A. B. to proceed to and view the said fence, and judge and determine of the sufficiency of that part assigned to you to be maintained by, and be a charge to be borne by, you:

We, therefore, do hereby give you, the said C. D., notice that, on the day of *instant*, at o'clock in the noon, we will proceed to view said fence and to consider of said request.

Dated, the day of 18 Yours, &c.

E. F.
G. H.
I. J.

Form of viewers' decision where the half of a fence that had been previously assigned is insufficient.

State of Illinois, }
La Salle county, } ss. Whereas, on the day of 18 it was represented to us, the subscribers, fence viewers for township in the said county, by A. B., that a difference had arisen between him and C. D., his neighbor, relative to the sufficiency of the *north* half of the partition fence on the division line between their adjoining lands, in said township, (describe the fence as in request:)

And whereas, we were at the same time requested, by the said A. B., to proceed to and view the said fence, and judge and determine whether the *north* half is sufficient:

And whereas, we did thereupon notify the said C. D., that, on the day of 18 at o'clock in the noon, we would proceed to view said fence and to consider of said request:

Therefore, we, the said fence viewers, having met pursuant to said request and notice, and it being satisfactorily proved to us, by the affidavit of R. S., that the said notice was duly served upon the said C. D., on the day of 18 and we, having viewed the said partition fence in the presence of the said A. B. and the said C. D., and having heard the statements and allegations of the said parties, do adjudge and determine the *north* half of the said fence to be insufficient, and that the same should be repaired.

Given under our hands and seals, the day of 18

E. F. [L. S.]
G. H. [L. S.]
I. J. [L. S.]

Duplicates of the above decisions should be made by the fence viewers, and they should furnish each of the parties with one.

Form of request to repair fence in conformity to the decision of fence viewers.

To Mr. C. D.:

SIR: I hereby request you to repair that part and portion of the partition fence on the division line heretofore assigned to you, and on the day of 18 adjudged and determined by E. F., G. H., and I. J., fence viewers, to be insufficient; of which decision the said fence viewers have notified you.

Dated, the day of 18 Yours, &c. A. B.

The following forms may be varied to suit either of the above cases.

Form of complaint.

State of Illinois, }
La Salle county, } ss. The complaint of A. B. of *Washington* precinct, in the said county, made the day of 18 before *Abram P. Hosford* and *Charles H. Sutphen*, Esquires, two of the justices of the peace of said county, who says that, on the day of 18 it was adjudged and determined by the fence viewers of township in said county, that the north half of the partition fence to be made on the division line between the adjoining lands of the said A. B. and C. D., in said township, commencing (describe particularly the partition fence,) should be made, maintained, and kept in repair, and be a charge to be borne by the said C. D., of which, on the day last aforesaid, the said fence viewers gave him notice; and that, on the day of 18 this complainant requested the said C. D. to make the half of said fence, so adjudged and determined to be a charge to be borne by the said C. D., and twenty days have expired from the service of said notice and request, and the said C. D. has neglected (or "refused") to make the same:

This complainant, therefore, prays that the said C. D. may be summoned to show cause why he, the said complainant, should not be ordered to make the said fence. A. B.

Exhibited before us, this day of 18
Abram P Hosford,
Charles H. Sutphen,
Justices of the peace.

Form of summons by two justices.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of said county, Greeting:

Whereas, complaint has been made before *Abram P. Hosford* and *Charles H. Sulphen*, Esquires, two of the justices of the peace of said county, by A. B., that, on the day of 18 it was adjudged and determined by the fence viewers of township, &c., in said county, that the *north* half of the partition fence to be made on the division line between the adjoining lands of the said A. B. and C. D., in said township, commencing (describe the partition fence as in the complaint,) should be made, maintained, and kept in repair, and be a charge to be borne by the said C. D.; of which he has had due notice, and been requested by the said A. B. to make the said half of said fence; and that, although twenty days have expired since the service of said notice and request, the said C. D. has neglected (or "refused") to make the same.

We, therefore, command you to summon the said C. D. to appear before the said justices, at the office of the said *Abram P. Hosford*, Esquire, in *Washington* precinct, in said county, on the day of *instant*, at o'clock in the noon, to show cause, if any he has, why the said A. B. should not be ordered to make the said fence.

Given under our hands and seals, this day of 18

Abram P. Hosford, [L. S.]
Charles H. Sulphen: [L. S.]

Form of order by two justices.

State of Illinois, }
La Salle county, } ss. Whereas, complaint has been made before us, *Abram P. Hosford* and *Charles H. Sulphen*, Esquires, two of the justices of the peace of the said county, by A. B. of *Washington* precinct, in said county, that, on the day of 18 it was adjudged and determined by the fence viewers of township in said county, that the *north* half of the partition fence, to be made on the division line between the adjoining lands of the said A. B. and C. D., in said township, commencing (describe the partition fence as in complaint,) should be made, maintained, and kept in repair, and be a charge to be borne by the said C. D., of which he had due notice, and had been requested by the said A. B. to make the said fence; and that, although twenty days had expired since the service of said notice and request, the said C. D. had neglected (or "refused") to make the same:

And whereas, we did thereupon issue a summons requiring the said C. D. to appear before us, on the day of 18 at o'clock in the noon, at the office of the said *Abram P. Hosford*, Esquire, to show cause, if any he had, why the said A. B. should not be ordered to make the said half of said fence, which summons, it appears by the return of

R. S., a constable of the said county, has been duly served upon the said C. D.:

And whereas, the said C. D. has appeared (or "has neglected to appear") before us in pursuance of the said summons, and having heard the proofs and allegations of the parties, (or "of the said A. B.,") and having considered the same and the matters of the said complaint:

We, therefore, do hereby adjudge, determine, and order that the said A. B. make the said fence. Given under our hands and seals, the day of 18

Abram P. Hosford, [L. S.]
Charles H. Sutphen. [L. S.]

Form of complaint to one justice for a warrant.

State of Illinois, }
La Salle county, } ss. The complaint of A. B. of *Washington* precinct, in the said county, made the day of 18 before *Abram P. Hosford*, Esquire, one of the justices of the peace of the said county, who says, [that upon his request the fence viewers of township in the said county, notified C. D., a neighbor of the complainant, that, on the day of 18 they would proceed to view the division line between their adjoining lands in said township, (describe the division line,) and judge and determine of the matters relative to the making and maintaining a partition fence thereon, which notice was duly served upon the said C. D.; that the said fence viewers having met pursuant to the said request and notice, and viewed the said division line in the presence of the said A. B. and the said C. D., and having heard the statements and allegations of the said parties, did adjudge and determine, that all the *north* half of the partition fence to be made on said division line, commencing (describe the partition fence as in the decision,) should be made, maintained, and kept in repair, and be a charge to be borne by the said C. D.; that the said C. D., having been notified of the above decision by the said fence viewers, and been rquested by the said A. B. to make a fence upon that part and proportion of the said division line so assigned to him, and having neglected (or "refused") to make the same, upon complaint thereof by the said A. B. to *Abram P. Hosford* and *Charles H. Sutphen*, Esquires, two of the justices of the peace of the said county, they issued a summons requiring the said C. D. to appear before them, on the day of 18 to show cause, if any he had, why they should not order the said A. B. to make the said half of said fence, which was returned by R. S., a constable of said county duly served: and the said C. D., having appeared before the said justices in pursuance of the said summons, and they, having heard the proofs and allegations of the

said parties and considered the matters of said complaint, did adjudge, determine, and order that the said A. B. make the said half of said fence:

And this complainant further says, that under and in pursuance of the said order, he has made the said half of the said fence, and that the costs and charges of making the same amount to the sum of dollars, and that the said C. D. neglects (or "refuses") to pay the same.] He, therefore, prays that the said C. D. may be summoned to answer this complaint.

A. B.

Exhibited before me, this day of 18
Abram P. Hosford,
Justice of the peace.

Form of summons.

State of Illinois, }
La Salle county, } ss. Whereas, complaint has been made before *Abram P. Hosford*, Esquire, one of the justices of the peace of the said county, by A. B., that, on the day of 18 the fence viewers of township in the said county, viewed the division line between his and C. D., his neighbor's adjoining lands, in their presence, and adjudged and determined that the *north* half of the partition fence to be made on said line, commencing (describe the partition fence,) should be made, maintained, and kept in repair, and be a charge to be borne by the said C. D.; and that, he having neglected (or "refused") to make the same for twenty days after notice of the said decision and request by the said A. B. to make the same, it was, on the day of 18 ordered by *Abram P. Hosford* and *Charles H. Sutphen*, Esquires, two justices of the peace of the said county, that the said A. B. make that part of the said partition fence adjudged to be made by the said C. D.; and that the said A. B. has, under and in pursuance of said order, made the said half of said fence, and that the costs and charges of making the same amount to the sum of dollars, which the said C. D. neglects (or "refuses") to pay.

Therefore, we command you to summon the said C. D. to appear before the said justice, at his office in *Washington* precinct, in said county, on the day of 18 at o'clock in the noon, to answer the said complaint. Hereof fail not at your peril. Given under the hand and seal of the said justice, the day of 18 *Abram P. Hosford.* [L. S.]

Form of subpœna.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to I. M., J. N., G. H., and L. M.:

We command you, and each of you, that you do, in your proper person, appear before *Abram P. Hosford*, Esquire, a justice of the peace of said county, at his office in *Washington* precinct, in said county, on the day of 18 to testify the truth according to your knowledge, touching the complaint of A. B. against C. D., relative to making a partition fence on the division line between their adjoining lands, on the part of the said A. B. (or "C. D.") And this you will in no wise omit. Given under the hand and seal of the said justice, the day of 18 *Abram P. Hosford.* [L. S.]

Form of conviction.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 complaint was made before *Abram P. Hosford*, Esquire, one of the justices of the peace of the said county, that (here insert that part of the complaint inclosed in brackets.)

Whereupon I issued a summons, directed to any constable of the said county, requiring him to summon the said C. D. to appear before me at my office in *Washington* precinct, in said county, on the day of 18 at o'clock in the noon, which, by the return of R. S., a constable of said county, appears to have been duly served: at which time and place, as well the said C. D. as the said A. B. appeared before me, and having heard the proofs and allegations of the said parties, and considered the same and the matters contained in the said complaint, I do adjudge and determine that the said C. D. pay to the said A. B. the sum of dollars the costs and charges of making that part of the said partition fence so assigned to the said C. D., and that a warrant issue therefor.

In witness whereof, I have hereunto set my hand and seal the day of 18 *Abram P. Hosford.* [L. S.]

Form of warrant of distress.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county, Greeting:

Whereas, A. B. complained before *Abram P. Hosford*, Esquire, one of the justices of the peace of said county, that, on the day of 18 the fence viewers of township in said county, viewed the division line between his and C. D. his neighbor's adjoining lands in their presence, and adjudged and determined that the *north* half of the partition fence to be made on said line, commencing (describe the partition fence,) should be made, maintained, and kept in repair, and be a charge to be borne by the said C. D.; and that he having neglected to make the same for twenty days after no-

tice of said decision and request by said A. B. to make the same, it was, on the day of 18 ordered by *Abram P. Hosford* and *Charles H. Sutphen*, Esquires, two justices of the peace of said county, that the said A. B. make that part of the said partition fence adjudged to be made by the said C. D.; and that the said A. B. has, under and in pursuance of the said order, made the said fence; and that the costs and charges of making the same amount to the sum of dollars, which the said C. D. neglects (or "refuses") to pay: that the said justice thereupon issued a summons, requiring the said C. D. to appear before him at his office in *Washington* precinct, in said county, on the day of 18 to answer the said complaint, which was returned duly served by R. S., a constable of said county, at which time and place, as well the said C. D. as the said A. B. appeared before the said justice, and he, having heard the proofs and allegations of the said parties, and considered the same, and the matters contained in the said complaint, did adjudge and determine that the said C. D. pay to the said A. B. the sum of dollars, the costs and charges of making that part of the said partition fence so assigned to the said C. D.; and it appearing that the said C. D. neglects (or "refuses") to reimburse the said costs and charges of making the said fence:

We, therefore, command you to distrain the goods and chattels of the said C. D. for the said sum of dollars, and, if he shall not pay the said sum, then that you sell the goods and chattels so by you distrained, and, out of the moneys arising by the sale thereof, that you pay the said sum of dollars to the said A. B. and return the overplus, if any, to the said C. D., after deducting the reasonable costs of taking, keeping, and selling the said distress.

Given under the hand and seal of the said justice, the day of 18 *Abram P. Hosford.* [L. S.]

CHAPTER XIII.

MARRIAGES.

By sec. 1 of "An act concerning marriages," it is enacted "That all male persons over the age of seventeen years, and females over the age of fourteen years, may contract and be joined in marriage: *Provided*, in all cases where either party is a minor, the consent of parents or guardians be first had, as is hereinafter required." *Gale's Stat.*, 459.

"SEC. 2. All persons belonging to any religious society, church, or denomination, may celebrate their marriage according to the rules and principles of such religious society, church, or denomination; and a certificate of such marriage, signed by the regular minister, or if there be no minister, then by the clerk of such religious society, church, or denomination, registered as hereinafter directed, shall be evidence of such marriage.

"SEC. 3. Any persons wishing to marry, or be joined in marriage, may go before any regular minister of the gospel, authorized to marry by the church or society to which he belongs, any justice of the supreme court, judge of any inferior court, or justice of the peace, and celebrate or declare their marriage, in such manner and form as shall be most agreeable. And such minister of the gospel, justice of the supreme court, judge, or justice of the peace, shall make a certificate of such marriage, and return the same, with the license, to the clerk of the county commissioners' court, who issued such license, within thirty days after solemnizing such marriage; and the clerk, after receiving such certificate, shall make a registry thereof, in a book to be kept by him for that purpose only; which registry shall contain the christian and sur-names of both the parties, the time of their marriage, and the name of the person certifying the same: and said clerk shall, at the same time, endorse on such certificate, that the same is registered, and the time when; which certificate shall be carefully filed and preserved, and the same, or a certified copy of the registry thereof, shall be evidence of the marriage of the parties."

By "An act to amend the 'act concerning marriages,'" it is recited and enacted as follows: "Whereas, under the provisions of the law regulating the mode of celebrating the rites of matrimony, and designating the persons who may celebrate these rights, doubts are entertained as to the right of any minister of the gospel to celebrate those rights, unless he have authority conferred upon him by some express action of the society to which he belongs: Therefore,

"SEC. 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That all marriages heretofore solemnized by ministers of the gospel, and those which may hereafter be so solemnized, shall be deemed and held to be lawful, and the issue of all such marriages shall be deemed legitimate: *Provided* this act shall not operate upon any marriages or issue, when such marriage was, or may be, consummated contrary to the laws of the land, for any other cause than that mentioned and provided for in this act." *Sess. Laws*, 1838–9, *p.* 277.

"SEC. 4. No person shall be joined in marriage as aforesaid, unless their intention to marry shall have been published at least two weeks previous to such marriage, in the church or congregation to which the parties, or one of them, belong; or unless such persons have obtained a license, as herein provided." *Gale's Stat.*, 459.

"SEC. 5. In all cases where publication of such intention to marry has not been made, as before described, the parties wishing to marry shall obtain a license from the clerk of the county commissioners' court of the county where such marriage is to take place; which license shall authorize any regular minister of the gospel, authorized to marry by the church or society to which he belongs, any justice of the supreme court, judge, or justice of the peace, to celebrate and certify such marriage; but no such license shall be granted for the marriage of any male under twenty-one years of age, or female under the age of eighteen years, without the consent of his or her father, or if he be dead or incapable, of his or her mother or guardian, to be noted in such license. And if any clerk shall issue a license for the marriage of any such minor, without consent as aforesaid, he shall forfeit and pay the sum of three hundred dollars, to the use of such father, mother, or guardian, to be sued for and recovered in any court having cognizance thereof: and for the purpose of ascertaining the age of the parties, such clerk is hereby authorized to examine either party, or other witness, on oath.

"SEC. 6. If any clerk shall, for more than one month, refuse or neglect to register any marriage certificate which has been, or may hereafter be delivered to him for that purpose, (his fee therefor being paid,) he shall be liable to be removed from office, and shall moreover pay the sum of hundred dollars to the use of the party injured, to be recovered by action of debt in any court having cognizance of the same.

"SEC. 7. If any minister, justice of the supreme court, judge, or justice of the peace, having solemnized a marriage, or clerk of any religious society, as the case may be, shall not make return of a certificate of the same, as required, within the time limited, to the clerk of the commissioners' court of the county in which such marriage was solemnized, he shall forfeit and pay one hundred dollars for each case so neglected,

to go to the use of the county, to be recovered by indictment. And if any minister of the gospel, justice of the supreme court, judge, or any other officer or person, except as herein before excepted, shall solemnize and join in marriage any couple without a license as aforesaid, he shall, for every such offence, forfeit and pay one hundred dollars to the use of the county, to be recovered by indictment."

Form of license.

State of Illinois, }
La Salle county, } ss. To any minister of the gospel, justice of the supreme court, judge, or justice of the peace of the said county:

Whereas, A. B. of in said county, has applied to me, the subscriber, clerk of the county commissioners' court of said county, for a license for the solemnization of matrimony between him and C. D. of in said county, and it satisfactorily appearing to me, upon an examination of the said A. B., upon oath, that he (or "upon an examination of E. F., upon oath, that the said A. B.") is of the age of twenty-one years and upwards, and that the said C. D. is of the age of eighteen years and upwards:

You are, therefore, hereby authorized to celebrate the marriage of the said A. B. and C. D. and certify the same, provided there shall be no impediment of kindred or alliance, or of any other lawful cause, and required to return a certificate of such marriage to me, the said clerk, within thirty days after solemnizing the same, together with this license.

In witness whereof, I have hereunto set my hand
[L. S.] and affixed the seal of the said court, the
day of 18 *Maurice Murphy.*

Another form.

State of Illinois, }
La Salle county, } ss. To any minister of the gospel, justice of the supreme court, judge, or justice of the peace of the said county:

Whereas, C. E. of in the said county, has applied to me, the subscriber, clerk of the county commissioners' court of the said county, for a license for the solemnization of matrimony between him and L. M. of in the said county, and it appearing to me that the said C. E. is of the age of seventeen years and upwards, and within the age of twenty-one, I. J., the father of the said C. E., now here in my presence, consents to his marriage with the said L. M.; and it appearing to me that the said L. M. is of the age of fourteen years and upwards, and under the age of eighteen, and it being satisfactorily proved to me by the oath of G. H., that R. S.,

her father, has given his consent to her marriage with the said C. E.:

You are, therefore, hereby authorized to celebrate the marriage of the said C. E. and L. M., and certify the same, provided there shall appear no impediment of kindred or alliance, or of any other lawful cause, and required to return a certificate of such marriage to me, the said clerk, within thirty days after solemnizing the same, together with this license.

In witness whereof, I have hereunto set my hand
[L. S.] and affixed the seal of the said court, the
day of 18 *Maurice Murphy.*

Form of certificate.

State of Illinois, }
La Salle county, } ss. I, the subscriber, one of the justices of the peace in and for the said county, do hereby certify that the marriage of C. E. and L. M., the persons in the within license named, was solemnized by me on the day of 18 X. Y.

CHAPTER XIV.

SABBATH BREAKING.

By sec. 1 of an act approved January 19, 1829, it is enacted "That any person who shall hereafter knowingly disturb the peace and good order of society, by labor or amusement, on the first day of the week, commonly called Sunday, (works of necessity and charity excepted,) shall be fined upon conviction thereof, in any sum not exceeding five dollars. That any person who shall by menace, profane or vulgar language, or disorderly or immoral conduct, disturb the peace or good order of any congregation, assembled for divine worship, such person so offending shall be deemed guilty of a high misdemeanor, and upon conviction thereof, shall be fined in any sum not exceeding fifty dollars: *Provided*, That this act shall not be construed to prevent watermen from landing their passengers, lading and unlading their cargoes, or ferrymen from carrying over the water travellers, or persons moving with their families, on the first day of the week: *Provided*, That the section shall not prevent the due exercise of the rights of conscience

by any person who may think proper to keep any other day as a Sabbath than the first day of the week." *Gale's Stat.*, 241.

"SEC. 2. That whoever shall be guilty of any noise, rout, or amusement on the first day of the week, called Sunday, whereby the peace of any private family may be disturbed, such person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not exceeding twenty-five dollars.

"SEC. 3. The justices of the peace, respectively, in their several counties, shall have jurisdiction of the aforesaid offences committed in their counties, and upon view, or information upon oath, may cause any such person, having offended, or being charged with having offended, as aforesaid, to be apprehended and brought before him to answer such charge.

"SEC. 4. When any person, having offended, or being charged with having offended, as aforesaid, shall be brought before any justice of the peace, if such person shall require it, a jury of not less than six, nor more than eight, shall be summoned to try the cause, and if the jury shall find the defendant guilty, they shall assess the fine, and the justice shall enter judgment therefor; but if no jury shall be required, the justice shall hear the cause, and render such judgment as to him shall seem right.

"SEC. 5. The judgments rendered under this act shall be subject to appeals, as in cases of assault and battery and affrays, and shall be collected in the same manner."

Form of warrant for offence in the justice's presence.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county:

Whereas, on the day of *instant*, at *Utica* precinct in the said county, C. D. did, in the presence of the subscriber, *Hiram Higby*, Esquire, one of the justices of the peace of said county, knowingly disturb the peace and good order of society, by amusement, on the first day of the week commonly called Sunday, to wit: by (here state the manner of the disturbance.)

These are, therefore, to command you forthwith to take the said C. D., and bring him before the said justice to answer the said charge, and to be dealt with according to law.

Given under the hand and seal of the said justice, the day of 18 *Hiram Higby.* [L. S.]

Form of information.

State of Illinois, }
La Salle county, } ss. The information and complaint of L. M., made before *Hiram Higby*, Esquire, one of the justices of the peace of the said county, the day of 18

who, upon oath, says that, on the day of *instant*, being the first day of the week, called Sunday, C. D. did make a *noise*. (here state the facts,) whereby the peace of the family of the said L. M. was disturbed, contrary to the form of the statute in such case made and provided. He therefore prays that the said C. D. may be required to answer this complaint.

L. M.

Exhibited before me, this day of 18 *Hiram Higby*, Justice of the peace.

Form of warrant on information.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county:

Whereas, L. M. has this day made and exhibited an information and complaint, upon oath, before *Hiram Higby*, Esquire, one of the justices of the peace of the said county, that, on the day of 18 being the first day of the week, being Sunday, at *Utica* precinct in said county, C. D. did make a *noise*, (state the offence as in the complaint,) whereby the peace of the family of the said L. M. was disturbed, contrary to the form of the statute in such case made and provided:

We, therefore, command you forthwith to take the said C. D., and bring him before the said justice to answer the said charge, and further to be dealt with according to law.

Given under the hand and seal of the said justice, the day of 18 *Hiram Higby*. [L. S.]

The forms of subpœna, venire, &c., page 233, in cases of assault and battery, may readily be altered to suit cases under this act.

Record of conviction for offence in the view of the justice.

State of Illinois, }
La Salle county, } ss. Be it remembered that on the day of 18 at *Utica* precinct in the said county, C. D. did, in my view, (set forth the offence as in the information,) and thereupon I caused the said C. D. to be arrested and brought before me, he still remaining in my view, and I proceeded in the presence of the said C. D., (if a jury was required, add, "and of a jury, at the request of the said C. D. for that purpose empannelled and sworn,") to enquire into the truth of the said charge, and after hearing the proofs and allegations of the parties, the said C. D., on the said day of 18 by me, the said justice, (if a jury was sworn, say "by the verdict of the said jury,") was convicted of the of-

fence aforesaid, and I, (or "the said jury,") assessed the fine which he should pay at the sum of dollars.

Therefore, it is adjudged and determined by me, the said justice, that the said C. D., for the offence aforesaid, shall forfeit and pay the said sum of dollars so assessed by me, (or "by the said jury,") and I did further adjudge and determine that the said C. D. should pay the sum of dollars for the costs and charges of this prosecution.

In witness whereof, I have hereunto set my hand and seal, this day of 18 *Hiram Higby.* [L. S.]

Record of conviction on an information.

State of Illinois, }
La Salle county, } ss. Be it remembered, that on the day of 18 L. M. came before me, *Hiram Higby*, Esquire, a justice of the peace of the said county, and made and exhibited his complaint and information, upon oath, and gave me to understand and be informed that, on the day of *instant*, at *Utica* precinct in the said county, C. D. did, (set forth the offence as in the complaint,) that thereupon I issued a warrant, and caused the said C. D. to be apprehended and brought before me; that afterwards, on the day of 18 I proceeded (as in the above form.)

Warrant of distress to levy fine and costs.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county:

Whereas, upon the information and complaint of L. M., lately exhibited upon oath before *Hiram Higby*, Esquire, a justice of the peace of said county, against C. D., for that on the day of 18 being the first day of the week, called Sunday, he did make a noise, (here state the facts as in the complaint,) whereby the peace of the family of the said L. M. was disturbed, and thereupon the said justice issued his warrant, and caused the said C. D. to be apprehended and brought before him, and proceeded in the presence of the said C. D., (if a jury was sworn, then add "and of a jury, at the request of the said C. D. for that purpose empannelled and sworn,") to enquire into the truth of the said charge, and after hearing the proofs and allegations of the parties, the said C. D., on the day of 18 by the said justice, (or "by the verdict of the said jury,") was convicted of the offence aforesaid, and the said justice (or "the said jury") assessed the fine which he should pay at the sum of dollars. And the said justice thereupon adjudged and determined that the said C. D. for the said offence should forfeit and pay the said sum of dollars, and the sum of dollars for the costs and charges of said prosecution:

We, therefore, command you immediately to levy the said sum of dollars for the fine aforesaid, and, also, the sum of dollars for the costs and charges aforesaid, by distress and sale of the goods and chattels of the said C. D., (except such goods and chattels as are by law exempt from execution,) giving twenty days notice of the day of sale, by putting up written advertisements at three of the most public places in the county. And do you return this precept with all convenient speed, with what you shall do hereon.

Given under the hand and seal of the said justice, the day of 18 *Hiram Higby.* [L. S.]

CHAPTER XV.

WORSHIPPING CONGREGATIONS.

By "An act to preserve good order in all worshipping congregations and societies in this state," it is enacted "That any person who shall, by menace, profane swearing, vulgar language, or any disorderly or immoral conduct, interrupt and disturb any congregation or collection of citizens assembled together for the purpose of worshipping Almighty God, or who shall sell, or attempt to sell, or otherwise dispose of ardent spirits or liquors, or any articles which will tend to disturb any worshipping congregation or collection of people, within one mile of such place, unless the person so selling or disposing of said spirituous liquors or articles shall be regularly licensed to keep a tavern or grocery, any person so offending shall be deemed guilty of a high misdemeanor, and upon conviction, shall be fined in any sum not exceeding fifty dollars: *Provided*, That this act shall not be so construed as to affect any person who may sell whiskey, or any other ardent spirits, at his own distillery, store, or dwelling house." *Gale's Stat.*, 727.

"Sec. 2. Justices of the peace, respectively, in their several counties, shall have jurisdiction of the aforesaid offences, and may, on view, or upon information on oath, cause every such person, having offended as aforesaid, to be apprehended and brought before him to answer such charge.

"Sec. 3. Any person who shall be accused as aforesaid, if he choose it, shall have the cause tried by a jury of six lawful jurors, and if he shall insist on a full jury, by twelve, who shall be summoned to try the cause; and if the jury shall find the accused guilty, they shall assess and state the amount of the

fine, not more than stated in the first section of this act, upon which the justice before whom the trial shall be had, or in case the person shall plead guilty, shall give judgment for fine and costs, and proceed to collect the same without delay; and when said fine shall be collected, the officer or person collecting the same shall be required to pay it over without delay to the treasurer of the proper county, taking his receipt therefor: and which receipt shall be filed with the clerk of the county commissioners' court; after which the said fine or fines which may be thus deposited shall be subject to the control of said court, and appropriated to the education of any poor orphan child or children of the proper county.

"SEC. 4. Any person who may consider himself or herself aggrieved by the judgment of the justice, may appeal to the circuit court of the county, and may remove the same, as in cases of assault and battery."

Form of complaint.

State of Illinois, }
La Salle county, } ss. The complaint and information of E. F. of said county, made before *Hiram Higby*, Esquire, one of the justices of the peace in and for the said county, on the day of 18 who being duly sworn by the said justice, on his oath says, that on the day of in the year of our Lord one thousand, &c., at *Utica* precinct in said county, L. M., of said county, did interrupt and disturb a collection of citizens, then and there in a (describe the house or grove,) assembled together for the purpose of worshipping Almighty God, by loud and profane swearing, (or as the case may be,) in the presence and hearing of said collection of citizens so assembled.

Exhibited before me on the day and year first aforesaid. *Hiram Higby.* } E. F.

Form where the disturbance is by selling liquor by a person licensed, but who does not sell at his tavern or grocery.

State of Illinois, }
La Salle county, } ss. The complaint and information of E. F. of said county, made before *Hiram Higby*, Esquire, one of the justices of the peace in and for said county, on the day of in the year of our Lord, &c., who being duly sworn by the said justice, on his oath, says, that L. M., on the day of, &c., at *Utica* precinct in said county, and not at the store, distillery, dwelling house, tavern, or grocery of the said L. M., and within one mile of the place where a congregation of citizens were then and there actually assembled together in a (describe the house or grove,) for the purpose of worshipping Almighty God, did sell ardent spirits to X. Y. and to divers

other persons, and thereby did then and there interrupt and disturb the said congregation so assembled. E. F.
Exhibited before me the day and year first aforesaid. *Hiram Higby.*

Form where the disturbance is by selling liquor by a person not licensed.

State of Illinois, *La Salle* county, ss. The complaint and information of E. F. of said county, made before *Hiram Higby*, Esquire, one of the justices of the peace in and for said county, on the day of, &c., who being duly sworn, on his oath says, that L. M. of said county, on the day of, &c., at *Utica* precinct in said county, and not at the store, distillery, or dwelling house of the said L. M., and without being regularly licensed to keep a tavern or grocery, and within one mile of the place where a congregation of citizens were then and there actually assembled together in a (describe the house or grove,) for the purpose of worshipping Almighty God, did sell ardent spirits to G. H. and to divers other persons, and thereby did then and there interrupt and disturb the said congregation so assembled.
Exhibited before me the day and year first aforesaid. *Hiram Higby.* E. F.

It would probably be an offence under this act to sell the liquor, whether the congregation was disturbed or not.

Form of warrant.

State of Illinos, *La Salle* county, ss. The people of the state of Illinois to any constable of the said county:

Whereas, E. F. of said county, has this day made complaint, on oath, before *Hiram Higby*, Esquire, one of the justices of the peace in and for said county, that L. M. of said county, on (set out the complaint.)

These are, therefore, to command you forthwith to apprehend the said L. M. and bring him before the said justice to answer the said complaint, and further to be dealt with according to law.

Given under the hand and seal of the said justice, the day of 18 *Hiram Higby.* [L. S.]

The forms of subpœna, venire, &c., page 233, may readily be altered to suit the cases under this act.

Record of conviction.

State of Illinois, *La Salle* county, ss. Be it remembered, that on the day of in the year of, &c., E. F. of said county, came before me, *Hiram Higby*, Esquire, one of the justices of the peace in and for the said county, and made and exhibited his complaint and information, upon oath, and gave me to understand

and be informed, that on, &c., at, &c., (recite the complaint to the end;) that thereupon I issued a warrant, and caused the said L. M. to be apprehended and brought before me; that afterwards, on the day of, &c., I proceeded in the presence of the said L. M., (if there was a jury, say, "and of a jury, at the request of the said L. M., for that purpose empannelled and sworn,") to enquire into the truth of the said charge, and after hearing the proofs and allegations of the parties, the said L. M., on the said day of, &c., by me, the said justice, (or if a jury, say, "by the verdict of the jury,") was convicted of the said offence, and I (or "the said jury") assessed the fine which he should pay at the sum of dollars.

Therefore it is adjudged and determined by me, the said justice, that the said L. M., for the offence aforesaid, shall forfeit and pay the said sum of dollars so assessed, and I do further adjudge and determine that the said L. M. shall pay the sum of dollars for the costs and charges of this prosecution.

In witness whereof, I have hereunto set my hand and seal, this day of 18 *Hiram Higby.* [L. S.]

Warrant of distress.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of said county:

Whereas, upon the information and complaint of E. F. of said county, lately exhibited, upon oath, before *Hiram Higby*, Esquire, a justice of the peace in and for said county, against L. M. of the said county, for that on, &c., at, &c., (as in complaint.) And thereupon the said justice issued his warrant, and caused the said L. M. to be apprehended and brought before him, and proceeded in the presence of the said L. M. (if a jury, then add, "and of a jury, at the request of the said L. M. for that purpose empannelled and sworn") to enquire into the truth of the said charge, and after hearing the proofs and allegations of the parties, the said L. M., on the day of, &c., by the said justice (or "by the verdict of the said jury") was convicted of the offence aforesaid, and the said justice (or "the said jury") assessed the fine which he should pay at the sum of dollars, and the said justice thereupon adjudged and determined that the said L. M., for the said offence, should forfeit and pay the sum of dollars, and the sum of dollars for the costs and charges of the said prosecution.

We, therefore, command you, without delay, to levy the said sum of dollars for the fine aforesaid, and also the sum of dollars for the costs and charges aforesaid, by distress and sale of the goods and chattels of the said L. M. And do you return this precept with all convenient speed, with what you shall do hereon.

Given under the hand and seal of the said justice, the day of 18 *Hiram Higby.* [L. S.]

CHAPTER XVI.

FEES IN CRIMINAL CASES.

Justices' fees in criminal cases.

	Cents.
For taking each complaint in writing, under oath,	25
For taking the examination of the accused, and the testimony of witnesses in cases of felony, and returning the same to the circuit court, for every seventy-two words,	12½
For each warrant,	25
Taking recognizance and returning the same,	50
For each subpœna,	25
Administering each oath,	6¼
For each jury warrant in a trial of assault and battery,	25
For entering the verdict of the jury,	12½
For each order or judgment thereon,	25
For each mittimus,	25
For each execution,	25
For entering each appeal,	25
For transcript of judgment and proceedings in cases of appeals,	50

But in all cases where the defendant shall be acquitted, or otherwise legally discharged, without the payment of costs, the justice shall not be entitled to any fees.

Constables' fees in criminal cases.

For serving a warrant on each person named therein,	25
Mileage, to be computed from the office of the justice who may have issued the same, to the place of service, for each mile,	6¼
Serving each subpœna,	12½
Mileage from the justice's office to the residence of the witness, per mile,	6¼
Taking each person to jail when committed,	25
Mileage from the justice's office to the jail, per mile,	6¼
For summoning jury in case of assault and battery,	50

But in all cases where the defendant shall be acquitted, or otherwise discharged, without the payment of costs, the constable shall not be entitled to any fees.

PART IV.

OF PROCEEDINGS BEFORE JUSTICES OF THE PEACE IN CIVIL CASES.

CHAPTER I.

OF THE JURISDICTION OF JUSTICES OF THE PEACE IN CIVIL CASES.

1. Of the jurisdiction.
2. Of proceedings without jurisdiction.

1. *Of the jurisdiction.*

Justices of the peace derive their authority for the hearing, trying, and determining civil suits, from the statutes.

But the courts held by them are not made courts of record. A court of record is that where the acts and judicial proceedings are enrolled for a perpetual memorial, which rolls are called the records of the court. 3 *Bl. Com.*, 24.

Justices of the peace, in holding courts for the trial of civil causes, do not enrol the proceedings had before them, but make memoranda of the issuing and return of process, of orders made, and judgments rendered, and file and keep all papers given them in charge. *Gale's Stat.*, 402.

Though the proceedings and judgment before a justice of the peace may not be technically a record, yet the original entries recorded by him in his book, are public documents. 1 *Starkie Ev.*, 256. And the statute, in directing the manner in which such proceedings and judgments may be authenticated, seems to regard them as in the nature of a record. *Gale's Stat.*, 287.

Where a suit is brought before a justice of the peace which terminates in a final judgment on the merits, then both parties shall be precluded from further litigation in relation to all matters that might have been decided in that case. 1 *Scam. Rep.*, 152.

A justice's court, it will be perceived from the manner of its organization and the powers conferred upon it, has but a limited jurisdiction. 1 *Scam. Rep.*, 237.

By sec. 1 of "An act concerning justices of the peace and

constables," it is enacted "That the justices of the peace in this state, shall have jurisdiction within their respective counties, to hear and determine all civil suits, for any debts or demands of the following description, viz: For any debt claimed to be due on a promissory note, contract, or agreement in writing, where the whole amount of such written contract, agreement, or note shall not exceed one hundred dollars. For any debt due upon a verbal contract or promise for a valuable consideration, not exceeding one hundred dollars. For any debt claimed to be due for goods, wares, or merchandise sold and delivered; or for work or labor done, or services rendered, where the amount claimed shall not exceed one hundred dollars. For any debt claimed to be due for money had and received, for money lent, for money paid by the plaintiff for the defendant at his request, and for money received by the defendant for the plaintiff's use, not exceeding one hundred dollars. For any debt claimed to be due upon open and unsettled accounts between individuals, where the whole amount of the accounts of either party shall not exceed one hundred dollars. For any debt claimed to be due upon any settled account, where the balance settled and ascertained between the parties, and remaining unpaid, shall not exceed one hundred dollars. For any debt claimed to be due upon a contract for rent, not exceeding one hundred dollars. For any debt claimed to be due for any specific article of property, whether due by bond, note, or verbal promise, not exceeding one hundred dollars. And for all debts claimed to be due, not exceeding one hundred dollars, for which the action of debt or assumpsit would lie: *Provided*, That nothing herein contained, shall be construed so as to vest a justice of the peace with jurisdiction, in any case in which an executor or administrator shall be a party, where the sum demanded exceeds twenty dollars, except for debts due for property purchased at an executor or administrator's sale, when the same does not exceed one hundred dollars." *Gale's Stat.*, 402.

In Dowling *v.* Stewart *et al.*, which was an action brought before a justice of the peace against Dowling, the owner of a dray, to recover the value of a hogshead of sugar, it having fallen into the river and been lost by the negligence of a servant employed to carry the sugar, it was held that the justice had jurisdiction. A fair construction of the above section will connect the word "demand" with the several species of debts enumerated in it. It was the design to give justices jurisdiction in the cases enumerated, not technically as for debts, but as demands of the kind indicated. The proof in this cause shows that the plaintiff's demand arose out of a verbal promise by the defendant to carry and deliver the hogshead of sugar for a valuable consideration, not expressed, yet implied in law, as he carried for hire. The demand did not exceed one hundred dollars; it arose out of a verbal contract, and would be

embraced in this clause of the statute, and we think is included within it.

The jurisdiction might also be sustained under the last clause of this section, which is as follows: "And for all debts (or demands) claimed to be due, not exceeding one hundred dollars, for which the action of debt or assumpsit would lie." An action of assumpsit, declaring specially on the promise to carry and deliver, would undoubtedly lie, the plaintiffs being required to show nothing more than that they were ready to pay for the services when rendered. 3 *Scam. Rep.*, 193.

A justice of the peace has jurisdiction of an action of assumpsit, brought by a workman to recover the value of his labor, done under a sealed contract to perform a particular piece of work, which is not completed, if he is prevented from finishing it by the other party. 1 *Scam. Rep.*, 410. So he has jurisdiction of a suit upon a note for one hundred dollars where the plaintiff does not claim interest. 1 *Scam. Rep.*, 594.

By sec. 1 of "An act to extend the jurisdiction of justices of the peace in certain cases," it is enacted "That justices of the peace in this state shall have jurisdiction in their respective counties, to hear and determine all civil suits for any debts and demands as described in the first section of an act entitled 'An act concerning justices of the peace and constables,' approved, February 3, 1827; although such debts or demands may have been originally over one hundred dollars, and reduced below that sum by fair credit: *Provided*, That nothing herein contained shall be construed so as to vest a justice of the peace with jurisdiction in any case, in which an executor or administrator shall be a party, where the sum demanded exceeds twenty dollars, except for debts due for property purchased at an executor or administrator's sale, where the debt claimed to be due shall not exceed one hundred dollars." *Gale's Stat.*, 425.

It has been held that a justice of the peace has jurisdiction of an open and unsettled account exceeding one hundred dollars, but reduced below that sum by fair credits; 2 *Scam. Rep.*, 175: and the court will presume that a credit allowed on an account by the plaintiff, in a suit before a justice of the peace, is a fair one, until the contrary is shown. 1 *Scam. Rep.*, 575. It must, however, be a *bona fide* credit, and not given merely to gain jurisdiction. 1 *Scam. Rep.*, 168.

A justice of the peace has jurisdiction of a set-off exceeding one hundred dollars, where the balance claimed by the defendant does not exceed that sum; and it appears that, if the balance exceeds one hundred dollars, the justice must do one of two things, either allow and set-off so much of the defendant's claim as will satisfy the plaintiff's claim, and give judgment for the defendant for costs, or dismiss the suit altogether. 3 *Scam. Rep.*, 298.

A justice of the peace has no jurisdiction of a suit for a de-

mand exceeding twenty dollars, in which an administrator is a party, except for debts due for property purchased at an administrator's sale. 1 *Scam. Rep.*, 249.

Justices of the peace have jurisdiction in cases commenced by attachment, where the amount claimed does not exceed the sum of fifty dollars. *Gale's Stat.*, 74.

There is no general provision contained in the statutes for the entertaining of penal actions before justices of the peace; yet some of the statutes creating fines and penalties, authorize the same to be collected before justices of the peace. Some of these statutes are lengthy, and cannot be sufficiently abridged but that they will come short of the substance and body thereof. In proceeding under any of them, it is presumed that reference will be had to them at large, as is often necessary to arrive at their correct meaning and intention. It is, therefore, deemed unnecessary to insert an abridgment of so much as authorizes the bringing of suits before justices of the peace.

Statute penalties are in the nature of punishments, and no inferior court or jurisdiction can have cognizance of any penalty recoverable under a penal statute, unless jurisdiction be given to it in express terms. 1 *Scam. Rep.*, 42.

By the act of February 12, 1827, it is enacted "That justices of the peace shall have jurisdiction, in addition to the jurisdiction conferred on them by the act entitled 'An act concerning justices of the peace and constables,' passed February 3d, 1827, in all actions of trespass on personal property, and in all actions of trover and conversion, when the damages claimed in any of the above specified actions do not exceed twenty dollars." *Gale's Stat.*, 414.

In order to render the judicial proceedings or judgment of any inferior court valid, it is necessary that the court should have jurisdiction of the subject matter, and of the person. 5 *Wend. Rep.*, 170.

Of the jurisdiction of the subject matter. Courts of inferior jurisdiction can take nothing by implication, but must show the power given them in every instance. 3 *Wend. Rep.*, 267. If they go beyond the authority conferred upon them by the statute, their proceedings are held to be void. 14 *Johns. Rep.*, 432. 19 *Johns. Rep.*, 33.

It is a clear and salutary principle, that inferior jurisdictions, not proceeding according to the course of the common law, are confined strictly to the authority given them. They can take nothing by implication, but must show the power expressly given them in every instance. The sound rule of construction in respect to the courts of justices of the peace is, to be liberal in reviewing their proceedings as far as respects regularity and form, and strict in holding them to the exact limits of jurisdiction prescribed by the statutes. 1 *Johns. Cas.*, 20. 3 *Scam. Rep.*, 194.

If a court has no jurisdiction of the subject matter of the suit, consent of the parties can never give it. 1 *Scam. Rep.*, 249, 332. 6 *Wend. Rep.*, 465. The law is well settled that, in order to justify a court not of record in taking cognizance of a cause, it must have jurisdiction of the subject matter, as well as of the person of the defendant. 1 *Scam. Rep.*, 558.

Where the justice has a general jurisdiction of the subject matter, and has obtained jurisdiction of the person, whatever errors he may commit in the subsequent proceedings in the suit will not render them void, but voidable only.

And where the jurisdiction of an inferior court depends upon a fact, which such court is required to ascertain and settle by its decision, such decision has been held to conclude. *Cowen & Hill's note to Ph. Ev.*, 1016. 1 *Starkie Ev.*, 240.

Of the jurisdiction of the person. The individual proceeded against must, in general, be notified in some legal form, in order to give the court or justice jurisdiction over him.

It is an indispensable requisite that, before the rights of a party can be determined either civilly or criminally, he shall have notice of the proceedings; and for this purpose he should be summoned in fact. 1 *Scam. Rep.*, 515. 4 *Bl. Com.*, 282.

It is essential to the exercise of all jurisdictions rendering judgments or decrees affecting the person or property of individuals, where the proceeding is by summons directed to the defendant, that they should have indisputable evidence before them that the party to be affected by their judgment or decree is regularly before them, otherwise their proceedings are *coram non judice*, consequently irregular and void. If the defendant does not appear, the plaintiff proceeds at his peril. He is bound to see that all antecedent proceedings are regular, and if they are not, he necessarily consents to meet the consequences of such irregularities. 1 *Scam. Rep.*, 174.

The defendant appearing, however, and proceeding in the cause without objecting to the process or service, will cure not only all defects and informalities in the process, but also the want of process. 1 *Saund.* 262, *c*, *note* 1. 1 *Scam. Rep.*, 267.

Objections to the proceedings of the justice on the ground that the defendant has had no notice, or but an insufficient notice of such proceedings, are in the nature of a plea in abatement to the jurisdiction of the justice, and are required to be made at the first moment at which the defendant is able to make them. 4 *Scam. Rep.*, 176.

Process improperly issued, as where a warrant is issued when the defendant ought only to be summoned, or a defective process, is cured if no objection be made to it at the time, but the defendant pleads and goes to trial. 2 *Caine's Rep.*, 134.

But if a court of limited jurisdiction issue process which is illegal; or if a court, whether its jurisdiction be limited or not, holds cognizance of a cause, without having gained jurisdiction of the person of the defendant by having him before it in the

manner required by law, the proceedings are void. 19 *Johns. Rep.*, 39. *Breese Rep.*, 165.

A justice can render judgment against a defendant only where process is personally served on him, or he appears in person before the justice, and waives process. A defendant cannot authorize a justice to render judgment against him, by sending a letter to such justice requesting him to enter judgment against the defendant in favor of the plaintiff, for an amount named in the letter, although the defendant expressly state that he waived the service of the process and authorize the judgment. A judgment obtained under such circumstances is not only voidable, but is totally void, and no one can acquire any benefit or right under it. 2 *Scam. Rep.*, 468.

But notice to the defendant need not in all cases be personal. The legislature may prescribe what notice shall be sufficient. Thus, in suits commenced by attachment, personal service is in certain cases dispensed with, and yet the justice may entertain jurisdiction of the cause, and render judgment. And the process must be properly served in order to confer jurisdiction. The return of a constable or other officer should state the time of the service of the process; so that the justice can determine whether it was regular and within the time prescribed by law. If the return shows that the service was not in time, it is insufficient and void, and, unless the party appears and waives the irregularity, the justice obtains no jurisdiction. 1 *Scam. Rep.*, 174.

3. *Of proceedings without jurisdiction.*

It is a general and well settled rule, that, where a court of special and limited jurisdiction has neither jurisdiction of the subject matter of the suit, nor of the person of the defendant, every thing done therein is absolutely void. *Breese Rep.*, 144. 1 *Scam. Rep.*, 237. 2 *Scam. Rep.*, 468.

A party who extends the powers of a court of special and limited jurisdiction, is a trespasser. 2 *Johns. Cas.*, 51. 7 *Cowen Rep.*, 251. So, where the justice exceeds his authority in granting process, as if he should issue a warrant for slander, or in any case not within his jurisdiction, the constable ought to refuse the execution of it; but if he should execute it, both the justice who issued, and the constable who executed it, would be trespassers. 3 *Burn's Justice*, 26. 1 *Scam. Rep.*, 237.

It has been held, that not only the court, or justice, and party, but all officers, and others, who were engaged in carrying into effect a judgment rendered in a cause of which the court had no jurisdiction, might be held liable as trespassers; 15 *Johns. Rep.*, 157, 493; and that, where a justice's court assumes jurisdiction in a case not conferred by statute, its acts are null and void, and the officer obeying its process in such a case,

makes himself liable; 1 *Scam. Rep.*, 200; that it is incumbent upon a ministerial officer to look to the jurisdiction of the court, but that he is bound to look no farther. 1 *Scam. Rep.*, 238. But this rule, it is apprehended, is subject to some qualification, particularly in regard to officers acting under process regular upon its face.

Where a court, having jurisdiction of the subject matter, issued an execution upon a judgment which had been satisfied, it has been held that the officer would be protected in executing it, and probably the justice who issued it by the direction of the party, not knowing it had lost its vitality; but that the party who acted knowingly must be considered a trespasser. 5 *Wend. Rep.*, 240.

A party in a justice's court is not accountable for the issuing of process, unless he directs or sanctions it. 7 *Cowen Rep.*, 249.

A ministerial officer is protected in the execution of process, whether the same issue from a court of limited or general jurisdiction, although such court have not, in fact, jurisdiction of the subject matter, and nothing appears in the same to apprise the officer but that the court also has jurisdiction of the person of the party to be affected by the process. 5 *Wend. Rep.*, 170.

But if the want of jurisdiction should appear on the face of the process, the justice who issues it, and the officer who executes it, would both be liable as trespassers. 1 *Scam. Rep.*, 332. 3 *Cowen Rep.*, 206.

The rule as to the liability of the justice is, if he acts without jurisdiction, his acts are void, equally so as if he was not a justice. But, if he has jurisdiction and errs in the exercise of it, his acts are only voidable, and can be taken advantage of only by *certiorari* or appeal. In the former case the justice is personally liable, but in the latter he is not. *Breese Rep.*, 144. 1 *Starkie Ev.*, 239.

CHAPTER II.

OF THE COMMENCEMENT OF SUITS AND THE SERVICE AND RETURN OF PROCESS.

1. Of the mode in which suits may be commenced, and the time they are considered as commenced.
2. Of a summons, and the service and return thereof.
3. Of a warrant or capias, and the service and return thereof.
4. Of special bail.
5. Of attachments and garnishments, and of seizing boats, &c.
6. Of general rules, &c.
7. Of suits instituted on agreement of parties.
8. Of suits instituted on motion, &c.
9. Of security for costs by non-residents.

1. OF THE MODE IN WHICH SUITS MAY BE COMMENCED, AND THE TIME THEY ARE CONSIDERED AS COMMENCED.

Suits may be instituted before justices of the peace by process, which may be either a summons, warrant, or capias, or an attachment, or by the voluntary agreement of the parties, or on the motion of the justice.

The issuing of the original process of summons, warrant, or attachment, is the commencement of the suit. 1 *Scam. Rep.*, 30. 3 *Johns. Rep.*, 42. 1 *Caine's Rep.*, 69.

In analogy with the practice in courts of record, no doubt, the leaving of a process with the constable's wife, or putting it in the mail, or giving it to a messenger, directed to, and for the purpose of being conveyed to, the constable to be served, would be considered a commencement of the suit. 17 *Johns. Rep.*, 63. 18 *Johns. Rep.*, 14. 1 *Scam. Rep.*, 30.

Where a defendant appears, though the process be void, and he is ignorant of the fact at the time of appearance, yet the court will not, afterwards, set that or the subsequent proceedings aside. 7 *Cowen's Rep.*, 366. Irregularity of process, whether the process be void or voidable, is cured by appearance without objection. 1 *Scam. Rep.*, 250.

2. OF A SUMMONS, AND THE SERVICE AND RETURN THEREOF.

Gale's Stat., 103. Sec. 3. "Every suit before a justice, except such as are hereinafter provided for, in a different manner, shall be commenced by summons, in which summons the justice shall specify a certain place, day, and hour for

the trial, not less than five, nor more than fifteen days from the date of such summons; at which time and place the defendant is to appear; which process shall be served at least three days before the time of trial mentioned therein, by reading the same to the defendant or defendants."

A summons from a justice of the peace to the defendant, to answer for a violation of a town ordinance relative to nuisances, is informal and insufficient; and in such a case it has been held that the plaintiff had not complied with the terms of the statute. Debt would have been most clearly the form of action. 1 *Scam. Rep.*, 290.

If the words "State of Illinois" appear in any part of the summons, it is sufficient. It is not necessary that it should be in the caption. Where a suit was dismissed by a justice of the peace because the words "the State of Illinois" were omitted in the summons, on an appeal, the circuit court allowed the summons to be amended by inserting those words. Held that there was no error. 2 *Scam. Rep.*, 475.

In estimating time for the return of a summons, one day is to be reckoned inclusive and the other exclusive, that is, the day the summons is issued is not reckoned, but the day of the return is. 2 *Cowen's Rep.*, 605. 4 *Scam. Rep.*, 421.

It is proper that ministerial officers, constables, and others charged with the service of process, should state clearly the time and manner of serving such process. And no plea of inconvenience, resulting to others from their neglect, should dispense with its performance. The following return upon a summons, "Executed on the within defendant, by his reading the within. Joseph Flenn, const., M. C.," is insufficient and void. 1 *Scam. Rep.*, 174.

The return of a sheriff should state the manner in which the process was executed. "Executed, Oct. 18th, 1832, as commanded within," is not a sufficient return to a summons. 1 *Scam. Rep.*, 239.

The return to a summons in these words, "Served by reading to the within, Oct. 23, 1832. John Shrigley, high constable, pr. L. Nichols, deputy high constable," is sufficient. 2 *Scam. Rep.*, 457.

Gale's Stat., 421. Sec. 11. "All summons shall be served by reading the same, as contemplated in the third section of the act of which this is an amendment, unless the defendant shall evade the service, and not listen to the same, or secrete himself; then the officer shall serve the same by leaving a copy at his place of residence with some white person of the age of ten years or upwards; and in all such cases, the constable shall make a special return when and how served, and the circumstances attending the same; and if the justice shall be satisfied that the defendant evaded the service by reading, and

that the party is sufficiently notified and summoned, he shall proceed to hear and determine the case."

Gale's Stat., 72. Sec. 30. "Plaintiffs in any action of debt, covenant or trespass, or on the case upon promises, having commenced their action or actions, by summons, may, at any *term* pending such suit, and before judgment therein, on filing, in the office of the clerk where such action is pending, a sufficient affidavit and bond, sue out an attachment against the lands and tenements, goods and chattels, right, credits, moneys and effects of the defendant, which attachment shall be entitled in the suit pending and be in aid thereof, and such proceedings shall be thereupon had, as are required or permitted in original attachments, in all things as near as may be. The thirtieth section of this act shall apply to attachments issued by justices of the peace as well as those issued by the circuit court."

The word printed "term" in the above section, should have been "time," as appears from the original law on file of the secretary's office.

3. OF A WARRANT OR CAPIAS, AND THE SERVICE AND RETURN THEREOF.

Gale's Stat., 403. Sec. 4. "If, previous to the commencement of a suit, the plaintiff shall make oath that there is danger that the debt or claim of such plaintiff will be lost, unless the defendant be held to bail, and shall state, under oath, the cause of such danger, so as to satisfy the justice that there is reason to apprehend such loss, the justice shall issue a warrant." Under this statute it is apprehended that the plaintiff would be required to state to the justice the facts upon which he grounded his application for a warrant. The plaintiff should satisfy the justice of the danger that the debt or claim will be lost unless a warrant issue. From the proofs of the facts the justice should be judicially satisfied, and has no right to be satisfied unless upon sufficient proof of the cause of such danger.

Gale's Stat., 419. Sec. 1. "That when any person or persons shall be about to commence an action of trespass or trover, before a justice of the peace, and he, she, or they shall make oath before such justice that he, she, or they verily believe that the benefit of whatever judgment may be recovered in such action, will be in danger of being lost, unless the defendant or defendants be held to bail; upon such oath being made, the justice shall issue a warrant, as in cases for debt, varying the same to suit the action."

Upon a warrant, the defendant is actually arrested and brought before the justice who issued the warrant, 9 *Cowen's Rep.*, 61, unless he enter special bail.

An arrest, technically and strictly speaking, is the actual corporeal seizing or touching the defendant's body; 3 *Bl. Com.*, 288; yet it now seems to be settled, that no manual touching the body or actual force is necessary to constitute an arrest and imprisonment. It is sufficient if the party be within the power of the officer and submits to the arrest. 1 *Wend. Rep.*, 210.

Bare words only, as if the constable say to the defendant that he has a warrant against him and that he arrests him, will not constitute an arrest if the defendant afterwards escapes from the constable; but, if the defendant acquiesces and goes along with the officer, this will be considered as submitting himself to the process, and as complete an arrest as if the officer had touched the person of the defendant. 2 *Selw. N. P.*, 1132.

So, if an officer comes into a room where the defendant is, and, having locked the door, tells him that he arrests him, this is an arrest, for the defendant is in the custody of the officer. 1 *Selw. N. P.*, 42.

And it is not necessary that the officer who has the authority, should be the hand that arrests, nor in the presence of the person arrested, nor actually in sight, nor is any exact distance prescribed. It is sufficient if he be *bona fide* and strictly engaged in the business of the arrest, and he will, for the purpose of authorizing it, be deemed constructively present. 10 *Johns. Rep.*, 85.

The constable being a ministerial officer appointed to carry into effect the laws, of necessity must be clothed with sufficient authority to execute the mandates to him directed, in the name of the people, and, in case of resistance, to require the assistance of as many men of his county as may be necessary to overcome such resistance. Accordingly, it is said, that the constable may (and ought, if need be) take the power of the county, that is, what number of persons he shall think good to aid him to execute, in every behalf, the people's process, be it whatever kind, it being the people's commandment. *Dalt. Sheriff*, 354. *Ritson's Const.*, 2*d Ed.*, 40.

When the plaintiff resides near the justice who issues the warrant, and the defendant is brought into court, it would be proper that the constable notify the plaintiff of the arrest; but, if the plaintiff do not reside near the justice, it would be well that he authorize some person who does, to attend to the suit for him, and give the constable information thereof.

In an action against an officer for an escape on process, sued out and placed in the officer's hands to execute; or in an action for a false return, or for a refusal to execute such process, it is no justification for suffering an escape, or for making a false return, or for a refusal to execute such process, that the forms of law, in suing out such process, have not all

been observed. If the process be regular on its face, and it be not absolutely void, having been issued without the authority of law, the officer can never be made a trespasser, although it may have been erroneously issued; and he is bound to execute the process, although it may have been erroneously sued out. If the magistrate had jurisdiction of the subject matter, the officer was not bound to enquire further into the accuracy of his proceedings, but should have proceeded to obey the mandate of the warrant. 1 *Sam. Rep.*, 200.

4. OF SPECIAL BAIL.

Gale's Stat., 403. Where a warrant has been issued by a justice of the peace, by sec. 4, "In all cases the defendant shall have a right to release his or her body arrested by virtue of such process, by giving special bail to the constable executing the same, which shall be endorsed on the back of the warrant, in the following form, as nearly as the case will admit, viz: 'I, G. F. acknowledge myself special bail for the within named C. D. Witness my hand this day of 18 G. F.' Which endorsement shall be signed by one or more securities, to be approved by the constable taking the same, and shall have the force and effect of a recognizance of bail, the condition of which is, that the defendant, if judgment shall be given against him or her, will pay the same with costs, or surrender his or her body in execution, and in default of such payment and surrender, the goods and chattels of the bail shall be liable for the payment of the judgment and costs: *Provided*, That if the body of the defendant shall be renderred in execution by himself or his bail, within thirty days after the issuing of such execution, or if a sufficiency of the defendant's property shall be found to satisfy the judgment and costs, the bail shall be exonerated."

Gale's Stat., 419. Sec. 1. Upon a warrant, issued in an action of trespass or trover, "the defendant may release his body by giving special bail, as in action of debt." And by the same section it is provided, "That in all cases where a defendant shall give special bail under the provisions of this act, or the act to which this is an amendment, and shall not be surrendered on or before the return day of the *scire facias* (*capias ad satisfaciendum* was probably intended) upon the judgment, nor a sufficiency of property be found to pay the judgment and costs, within the time aforesaid, it shall be the duty of the justice of the peace, upon the application of the plaintiff, or his agent, to issue a summons against the special bail, in which summons the justice shall specify a certain day, place, and hour for the trial, not less than ten, nor more than fifteen days from the date thereof, at which time and place the defendant is to appear; which process shall be served at least

five days before the time of trial mentioned therein, by reading the same to the defendant or defendants."

By sec. 4. of the act of 1827, it will be perceived that, if the body of the defendant is rendered in execution, the bail shall be exonerated. It is not supposed that the legislature, in the amendment of the above act and in extending its provisions to the actions of trover and trespass, intended in any way to alter the condition of the recognizance of the bail. There is certainly no express provision changing the conditions of the recognizance. There can be no forfeiture, upon which the bail can be charged, until an execution against the defendant has been issued and returned. It seems, therefore, that the process intended to be authorized by the last act, was an execution against the body, and not a *scire facias*.

Gale's Stat., 420. Sec. 2. "If the defendant or defendants shall not appear at the time of trial, after being served with a summons, as directed in the first section of this act, and no sufficient reason be assigned to the justice why he or she does not appear, then the justice shall render a judgment against the defendant or defendants, and issue execution thereon immediately.

"SEC. 3. If the defendant shall appear at the time and place appointed for trial, he shall be permitted to show cause for his failure to comply with the condition of his undertaking, or to show that he hath complied with the same; and if it shall appear that the defendant was prevented from surrendering the body of the original defendant, by the act of the plaintiff, or that the said original defendant had departed this life previous to the time required for making such surrender, or that his health was such as to endanger his life by such surrender, or that he had delivered the body in execution, according to the condition of the recognizance, then the bail shall be released and discharged from all liability.

"SEC. 4. Either party shall have the right to appeal to the circuit court from any judgment which may be rendered under the provisions of this act."

The defendant, if at large, may come and surrender himself, or he may be surrendered by his bail, and, if he will not voluntarily submit to be surrendered, the bail may arrest and take him at any time and in any place, for the purpose of surrendering him. 2 *Johns. Rep.*, 104. 1 *Dunl. Pr.*, 200. *Tidd's Pr.*, 147.

The power of taking and surrendering is not exercised under any judicial process, but results from the nature of the undertaking by the bail. The bail piece is not process, nor any thing in the nature of it, but is merely a record or memorial of the delivery of the principal to his bail or security given. It cannot be questioned but that bail, in the common pleas, would have a right to go into another county in the state to take the principal. This shows that the jurisdiction of the court

in no way controls the authority of the bail, and as little can the jurisdiction of the state affect his right, as between the bail and his principal. Bail, in the language of the books, are said to have their principal always upon a string, which they may pull whenever they please, and surrender him in their own discharge; they may take him up even on a Sunday, and confine him until the next day, and then surrender him. Bail may break open the outer door of the principal, if necessary, in order to arrest him. 7 *Johns. Rep.*, 145. This power may also be deputed to another. 1 *Johns. Cases*, 413.

An execution against the body of the principal must not only be sued out, but must be actually returned, *defendant is not found*, and filed, before the plaintiff can proceed to charge the bail. 3 *Johns. Rep.*, 514. Taking the principal on an execution, is a discharge of the bail, and no execution need be returned. 2 *Johns. Cases*, 283. 7 *Cowen's Rep.*, 472. The bail are not discharged by the plaintiff's electing to sue out an execution against the goods and chattels of the defendant in the first instance; and if part of the debt be levied on the execution, he may, notwithstanding, resort to the bail for the residue. 4 *Johns. Rep.*, 407. If the plaintiff makes an agreement with the defendant, whereby the payment of the judgment is delayed until a later period than it could have been enforced, and without the assent of the bail, the bail would be discharged. 10 *Johns. Rep.*, 587.

It is a general rule, that, where the plaintiff himself has prevented a surrender by throwing the bail off his guard, he will not be permitted to avail himself of his own gross negligence or fraudulent contrivance in order to fix the bail. 4 *Johns. Rep.*, 480.

5. OF ATTACHMENTS AND GARNISHMENTS, AND OF SEIZING BOATS, ETC.

1. Of attachments, and the serving and return thereof.
2. Of garnishments.
3. Of seizing of boats and other vessels.

1. *Of attachments, and the serving and return thereof.*

Gale's Stat., 74. By sec. 1 it is enacted "That hereafter, when any creditor, his agent or attorney shall make oath before any justice of the peace in this state, that any person is indebted to such creditor in a sum not exceeding fifty dollars, and such person so absconds or conceals himself, or stands in defiance of a peace officer, authorized to arrest him on civil process, so that such process cannot be served, it shall be lawful for the justice to grant an attachment against the personal estate of such person, directed to any constable of the county, returnable before himself, within thirty days from the date thereof, *Provided*, That upon issuing any at-

tachment as aforesaid, the justice shall take from the creditor, his agent or attorney, a bond payable to the defendant with good security, in a penalty of double the amount for which the attachment is prayed to be issued; conditioned, that such creditor will pay the defendant all damages which he may sustain by reason of the wrongful suing out the attachment.

"SEC. 2. The constable to whom any attachment may be delivered, shall without delay execute the same, by levying on the personal property of the defendant, of value sufficient to satisfy the debt, or damages claimed to be due and all costs attending the collection of the same; he shall also read the same to the defendant, if the defendant can be found in the county, and make return thereof stating how he has executed the same. No attachment shall be abated or dismissed for want of form, if the essential matters expressed in the foregoing precedents be substantially set forth; and justices of the peace shall allow any amendment to be made, of any affidavit, writ, return or bond which may be necessary to obviate objections to the same; and in cases of appeals to the circuit courts, the courts shall allow amendments as aforesaid."

Under a former statute of this state, it has been decided that, if the affidavit upon which an attachment is issued, does not comply with the requisitions of the statute, the proceedings under it are void, and the attachment ought to be quashed. *Breese's Rep.*, 222.

But in the case of Hunter *v.* Ladd, 1 *Scam. Rep.*, 551, which arose under the present statute, an attachment bond was signed by the principal, Hunter, and surety, but no seals were affixed to the bond, and the defendant moved to dismiss the suit for the want of a sufficient bond, and thereupon the plaintiff moved that he be allowed to amend the bond by affixing the seals, which motion the court overruled, and dismissed the suit. Upon error to the supreme court, it was decided, that it was competent for Hnnter to be allowed to attach the seal to his own signature, and so far the application might have been granted under our statute admitting of such amendments, but thereby the court could not confer a power on, or permit, Hunter to make or attach a seal to the signature of a surety to the bond: such a seal would not be the seal of the co-obligor. The decision, refusing to permit the amendment, was not erroneous, although, so far as regards Hunter, it might have been granted; yet, if amended, it would not render the bond valid, because of the want of the seal to the signature of the co-obligor. As the application did not extend to the perfection of the bond in relation to the signature and seal of the co-obligor, the municipal court could not do otherwise than dismiss the suit.

"SEC. 3. Upon the return of any attachment issued by a

justice of the peace, if it shall appear that the defendant has been personally served with the same; or if such defendant shall appear without such service, the justice shall proceed to hear and determine the cause, as in cases of proceeding by summons. But if it does not appear that the defendant has been served, and no appearance be entered by the defendant as aforesaid, the justice shall continue the case ten days, and shall immediately prepare a notice to be posted up at three public places in the neighborhood of the justice, directed to the defendant, and stating the fact, that an attachment had been issued, and at whose instance, the amount claimed to be due, and the time and place of trial; and also stating, that unless the said defendant shall appear at the time and place fixed for trial, that judgment will be entered by default, and the property attached, ordered to be sold to satisfy the same; which notice shall be delivered to the constable, who shall post three copies of the same, at three public places in the neighborhood of the justice, at least eight days before the day set for trial; and on or before that day he shall return the notice delivered to him by the justice, with an endorsement thereon, stating the time when and the place where he posted copies, as herein required.

"SEC. 4. When notices shall be given of any proceedings by attachment, as required by the third section of this act, the justice shall on the day set for trial of the cause, proceed to hear and determine the same, as though process had been personally served upon the defendant; and if judgment be given against the defendant, shall order a sale of the property attached, or so much thereof as will satisfy the judgment, and all costs of suit. But if the constable shall have failed to post the notices as herein required, the justice shall again continue the cause, and require notices to be posted as aforesaid previous to any trial of the cause.

"SEC. 5. When any constable shall be unable to find personal property of any defendant, sufficient to satisfy any attachments issued under the provisions of this act, he is hereby required to notify any and all persons within his county, whom the creditor shall designate, as having any property, effects, or choses in action, in his possession or power belonging to the defendant, or who are in any wise indebted to such defendant, to appear before such justice on the return day of the attachment, then and there to answer upon oath, what amount he or she is indebted to the defendant in the attachment, or what property, effects or choses in action he or she had in his or her possession or power, at the time of serving the attachment. The person or persons so summoned, shall be considered as garnishees, and the constable shall state in his return, the names of all persons so summoned, and the date of service on each.

"SEC. 6. When an attachment shall be returned executed

upon any person as garnishee, the justice shall make an entry upon the record of his proceedings in the cause, stating the name of each person summoned, and continue the case as to such garnishee, and shall proceed with the cause as against the defendant in the attachment as though the attachment had been levied on personal property."

"SEC. 9. Judgments obtained under the provisions of this act, where the defendant has been personally served with process, or shall have appeared to the action, shall have the same force and effect as judgments obtained upon a summons; but the property attached shall be sold before any execution is issued upon such judgment, and if such property shall not sell for a sum sufficient to pay the judgment and costs, execution may be issued to collect the balance.

"SEC. 10. Judgments obtained under the provisions of this act, when the defendant has not been personally served with process, and no appearance being entered, shall only authorize a sale of the property levied upon, and proceedings against the garnishees to collect the amount thereof. Defendants in attachments issued under the provisions of this act, where property may be levied upon, or the person in whose possession the property may be found, may retain possession of such property, upon executing a bond to the plaintiff in the attachment with good security, in a penalty of double the amount claimed by the attachment, conditioned that the property shall be delivered to any constable of the county whenever demanded, to be sold in satisfaction of any judgment which may be obtained in the attachment suit, or in case the property is not delivered, that the obligors will pay and satisfy the said judgment and costs, and when a bond shall be executed, the constable shall return the same with the attachment, and upon a breach of any condition thereof, the plaintiff shall have a right to prosecute suit thereon, and to recover the amount due upon his judgment and costs.

"SEC. 11. In all cases arising under this act, when two or more attachments shall be levied on the same property, or be proved on the same garnishee, and judgment shall be entered on the same day, the proceeds of the property attached, or the money obtained from garnishees, shall be divided among the several plaintiffs in attachments, according to the amount of their judgments respectively."

"SEC. 13. Any person claiming the right of any property, levied on by any attachment issued by a justice of the peace, may have a trial of the right of property, in the same manner as if such property had been levied on by virtue of an execution, issued by a justice of the peace, *Provided, always*, appeals from the judgment of justice of the peace, under the provisions of this act, may be allowed, taken and perfected, as in

other cases of appeals from the judgments of justices of the peace."

Sess. Laws of 1839–40, *p.* 30. By "An act concerning attachments," it is enacted "That hereafter when any attachment shall be placed in the hands of any sheriff or other officer, and the defendant shall be in the act of absconding with his goods and effects, it shall be lawful for such officer to pursue the said defendant into any county of this state, and to levy upon and take the goods and chattels of said defendant back to the county from which said attachment issued, any law to the contrary notwithstanding."

Sess. Laws of 1842–3, *p.* 19. By "An act amending the several acts relative to attachments" it is enacted, "That whenever any creditor, his agent or attorney, shall make oath or affirmation before any justice of the peace in this state, that any person being a non-resident of this state, is indebted to such creditor in a sum not exceeding fifty dollars, it shall be lawful for such justice to issue an attachment against the personal estate of such non-resident, to any constable of said county, returnable before said justice, according to the provisions of an act regulating proceedings by attachment before justices of the peace, approved, February 27th, 1837."

A justice of the peace has no jurisdiction of an action by attachment for a demand exceeding fifty dollars, and the justice who issues, and the constable who executes, process in a case where a justice has no jurisdiction, both are liable as trespassers. 1 *Scam. Rep.*, 332.

2. *Of garnishments.*

A garnishee is a third person or party in whose hands money is attached, by process out of the court, and so called because he has had garnishment or warning not to pay the money to the defendant, but to appear and answer to the plaintiff creditor's suit. *Jac. Law Dic., tit. Garnishee.*

Gale's Stat., 77. "Sec. 7. When judgment is entered by a justice of the peace against a defendant in attachment, and any person or persons have been summoned as garnishee in the case, it shall be the duty of the justice to issue a summons against each person so summoned, requiring him or her to appear before the justice at a time and place to be fixed in the summons, not less than five nor more than fifteen days from the date thereof, and show cause, if any he or she has, why a judgment shall not be entered against him or her for the amount of the judgment and costs against the defendant in attachment, which summons shall be served and returned by some constable of the county, and on the return day thereof, if any person so summoned shall fail to appear, the justice shall enter judgment against the person so failing to appear, for the amount of the judgment obtained against

the defendant in attachment, and execution shall be issued thereon, as in other cases.

"SEC. 8. If any garnishee shall appear at the time and place required by the constable as aforesaid, and shall upon oath deny all indebtedness to the defendant in the attachment, and deny having any property or effects or choses in action in his possesion or power belonging to such defendant, the justice shall forthwith discharge him unless the plaintiff in the attachmeut shall satisfy the justice by other testimony that the garnishee was indebted to the defendant in the attachment, or had property, effects, or choses in action in his possession or power, at the time he was garnisheed; in which case the justice shall give judgment in the premises according to the right and justice of the cause, and issue execution as in other cases."

"SEC. 12. Persons who are summoned as garnishees under the provisions of this act, may avail themselves in their defence of any sets-off or claim against the defendants in attachment, whether the same be due or not, *Provided*, the same would be allowed, if due, in a suit prosecuted by such defendant."

A man may attach money or goods in the hands of a garnishee. So he may attach jewels, or chests, or boxes locked. So he may attach money due from the garnishee upon a bond or upon a bill of exchange. And money due upon a bond or contract may be attached before the day of payment. But there shall not be execution till a payment incurred. So, if money be due upon an account, and there be a promise to pay at a future day, it may be attached before the day. 1 *Com. Dig.*, 599.

An attorney may be held as trustee for his client for money collected, while it is in his hands. 12 *Mass. Rep.*, 141. And a person may be held as trustee on account of property deposited in his hands, which property is not liable to be attached in the usual manner at that time, as hides while tanning. 14 *Mass. Rep.*, 271. Yet, a plaintiff cannot take money or goods out of the hands of a garnishee who has a lien upon them, without discharging the lien. 5 *Taunt. Rep.*, 575. 1 *Scam. Rep.*, 67, *a.* (*c.*)

A promisor in a chose in action not negotiable after assignment of it, cannot be held as a trustee of the promisee. If the assignee gives notice to the garnishee, and he disclose such assignment, he must be discharged. 4 *Mass. Rep.*, 450. Otherwise of a contract or memorandum in writing not negotiable before assignment. 2 *Mass. Rep.*, 524. Where A.'s debtor has made an express promise to A.'s factor to pay him the debt, he cannot be held as garnishee of A., lest he should be twice charged. 4 *Mass. Rep.*, 359. When A. promises to perform labor for B. to a certain amount, A. cannot be held as trustee for B. until after breach of the promise.

4 *Mass. Rep.*, 170. 4 *Term Rep.*, 102. Otherwise of a contract to deliver goods or pay money by contract not negotiable, unless actually assigned and notice given to the promisor.

An officer who has collected money on an execution, is not a trustee of the plaintiff in that action until demand is made. 3 *Scam. Rep.*, 452. 5 *Mass. Rep.*, 319. Till demanded, though after the execution is returnable, the property is in the custody of the law. Money levied on execution by the sheriff upon a *fieri facias*, cannot be attached. 1 *Com. Dig.*, 600.

An executor or administrator cannot be held as trustee of a creditor of the deceased, 8 *Mass. Rep.*, 246. *Cro. El.*, 843, nor can a public officer be held as trustee of a creditor having claims on a public fund. 7. *Mass. Rep.*, 259. A defendant in an action, after he has pleaded to issue, is not liable as the trustee of the plaintiff, because he would otherwise be liable to be twice charged ; 3 *Mass. Rep.*, 121, 4 *Mass. Rep.*, 238. 1 *Com. Dig.*, 601 ; nor is an endorser of a promisory note, after a verdict against him by the endorsee, before judgment. 2 *Mass. Rep.*, 33. There cannot be any attachment of goods of which the garnishee has no property at the time, nor for goods taken by trespass. 1 *Com. Dig.*, 601. When a suit is pending for the recovery of a debt, the defendant cannot be held as a trustee of the plaintiff. 4 *Mass. Rep.*, 238. So where a suit is commenced in a superior court, the debtor cannot be held as a garnishee. 1 *Com. Dig.*, 600. *Cro. El.*, 157.

If part of the debt be attached, it may be pleaded in bar *pro tanto*. So if there be a recovery before plea, though after an action commenced, it may be pleaded in bar. And if a garnishee be prosecuted, he may plead in abatement that the goods were attached before suit commenced. 1 *Com. Dig.*, 604.

3. *Of the seizure of boats and other vessels, &c.*

Gale's Stat., 73. "SEC. 1. *Be it enacted by the people of the state of Illinois, represented in general assembly:* That boats and vessels of all description, built, repaired, or equipped, or running upon any of the navigable waters within the jurisdiction of this state, shall be liable for all debts contracted by the owner or owners, masters, supercargoes, or consignees thereof, on account of all work done, supplies or materials furnished by mechanics, tradesmen, and others for, or on account of, or towards the building, repairing, fitting, furnishing, or equipping such boats or vessels, their engines, machinery, sails, rigging, tackle, apparel and furniture ; and such debt shall have a preference of all other debts due from the owners, or proprie-

tors, except the wages of mariners, boatsmen, and others employed in the service of such boats and vessels, which shall first be paid.

"Sec. 2. Any person having a demand, contracted as before mentioned, against any such boat or vessel, may have an attachment to be issued out of any court, or by any justice of the peace having jurisdiction thereof, in any county in this state, in which such boat or vessel may be found, either against the owner or owners, by their proper names, or by the name and style of their co-partnership, if known, otherwise against such boat or vessel, by her name or description only, authorizing and directing the seizure and detention of the same, with her engine, machinery, sails, rigging, tackel, apparel and furniture, by the *sheriff or constable*, upon affidavit being made of the justice of such demand, and bond given by the plaintiff, as in other cases of attachment: *Provided*, that in all cases, where such proceedings are instituted against such boat, or vessel by her name or description only, the bond to be given by the plaintiff, shall be made payable to the people of the state of Illinois, but for the use and benefit of the owner or owners of such boat or vessel, who may institute a suit thereon, if damages be occasioned by the issuing of such attachment, and have recovery thereon in the same manner as if said bond had been given to such person or persons by their proper names, or in the name and style of their co-partnership.

"Sec. 3. Upon the return of such attachment, the person or persons having demands of the description aforesaid, and for whose benefit such attachment was issued, shall file a written declaration or statement, against such boat or vessel, by her name or description, or against the owner or owners, if known as aforesaid, briefly reciting the nature of the demand, whether for work done, or materials, firewood, or supplies of provisions furnished, and whether at the request of the owner, master, supercargo, or consignee of such boat or vessel, and that such demand remains unpaid; annexing to such declaration or statement, a bill of the particulars constituting such demand in separate and distinct items; and the like proceedings shall be had in all other respects, and the like judgment and execution, as in other cases of attachment.

"Sec. 4. All engineers, pilots, mariners, boatsmen, and others employed in any capacity, in or about the service of any such boat or vessel, who may be entitled to arrearages of wages, in consequence of such service, may proceed to collect such wages under the provisions of this act, and shall be entitled to all the benefits thereof.

Sec. 5. If the owner or owners, master, supercargo, or consignee of any such boat or vessel, seized by attachment as aforesaid, shall, at any time before final judgment, give

bond to the plaintiff, with security to be approved by the clerk of the circuit court, or by the judge in term-time, (or justice of the peace as the case may be,) in double the amount of the demand sued for, and a sufficiency to discharge all costs which may accrue thereon, conditioned to pay and satisfy such judgment as the court (or justice of the peace) may render against such boat or vessel or defendant party, together with the costs of suit, then such boat or vessel shall be forthwith discharged from such attachment, seizure, and detention; but shall, nevertheless, be liable to be taken and sold on any execution to be issued on such judgment, or upon the judgment which may be rendered at any time on the bond required to be given by the defendant party as aforesaid."

Appeals for the removal of causes from an inferior to a superior court for the purpose of obtaining new trials, are unknown to the common law, and can only be prosecuted when they are expressly given by statute. In order to enable the owner or consignee of a vessel attached under the above statute, to take an appeal from the judgment of a justice of the peace in such cases, he should make himself a party defendant to the suit before the justice, under the 5th section of the act, if any appeal is allowed by law. 1 *Scam. Rep.*, 511.

6. GENERAL RULES APPLICABLE TO A SUMMONS, WARRANT, OR ATTACHMENT.

In all process, either by summons, warrant, or attachment, if either party sues, or is sued, in a particular character, the character ought to be regularly set forth in the process. Upon common process not bailable, and which does not specify the character or right in which the plaintiff sues, he may declare as executor or administrator, or *qui tam*, &c., for this does not tend to enlarge but to narrow the demand which the defendant was called to answer; but, if the process is in a special character, the plaintiff must declare in the same character, and cannot declare generally. 1 *Chit. Pl.*, 284. 2 *Caine's Rep.*, 136.

But it would be advisable, if the suit is intended to be in a special character, that it should be so expressed in the process, in order that the proceedings may appear regular, and that the justice may enter the suit properly in his docket at its commencement; and for this further reason, that usually there is no formal written declaration wherein the character in which the plaintiff sues is set forth. The name of the plaintiff must be stated in the process, and if either the Christian or surname be omitted or mistaken, the defendant may plead the omission or misnomer in abatement. 1 *Com. Dig.*, 19. 2 *Scam. Rep.*, 290.

The full Christian and surname of the defendant should be inserted in all process. 3 *Chit. Gen. Pr.*, 170.

The misspelling a name, when the variation does not materially alter the sound, is no ground for a plea in abatement, or for discharging the process. 1 *Chit. Pl.*, 279.

And the omission of the middle name, or the initial letter thereof, commonly called the middle letter, as, for instance, John Doe, when the actual name is John S. Doe, is not a legal misnomer; and the omission is immaterial, for the law knows but one Christian name. 5 *Johns. Rep.*, 84.

Partners must sue and be sued by their names at length, and not in the name of the firm. 3 *Caine's Rep.*, 170. 1 *Scam. Rep.*, 475.

The third and fourth sections of the act conferring jurisdiction in civil cases upon justices of the peace, prescribe the form of process by which suits shall be commenced under that act. *Gale's Stat.*, 403. And where a suit is commenced for debt or demand as there provided for, the plaintiff may declare either in debt or assumpsit, according to the nature of the demand upon which the suit is instituted.

Under the act of January 23d, 1829, when the plaintiff shall make the requisite oath in case of trespass or trover, the justice shall issue a warrant as in cases of debt, varying the same to suit the action. *Gale's Stat.*, 419.

And it is apprehended that, in all the cases in which the statute has conferred jurisdiction upon justices of the peace to hear and determine, when the form of process is not prescribed by the statute, it would be necessary that the cause of action should be stated in the process, so that the defendant may be advised of the true cause of complaint against him. *Gale's Stat.*, 405, *sec.* 10.

The justice shall endorse on every summons or warrant, the sum demanded by the plaintiff, with the costs due thereon, and the defendant may pay the same to the constable in whose hands such process may be, who shall give a receipt therefor, which shall exonerate the defendant from debt and costs.

Gale's Stat., 420. "SEC. 7. Where the defendant, upon whom any summons or warrant issuing from a justice of the peace, shall be served, shall pay, or tender to the constable, the amount actually due, with all costs then accrued, and shall prove the same upon trial, and bring the money forward, and deposite it with the justice of the peace, no costs which shall thereafter accrue, shall be adjudged against him, but the plaintiff shall pay the same."

Though process issued by a justice may be altered by his direction, yet a general authority by him to a constable to alter the dates of executions instead of renewing them, or to fill up or alter process, is void. 10 *Johns. Rep.*, 405.

An alteration of the process of the court between its de-

livery by the clerk to the party or his attorney and its reception by the sheriff, is illegal and highly improper. 1 *Scam. Rep.*, 123.

Irregularity of process, whether the process be void or voidable, is cured by appearance without objection. 1 *Scam. Rep.*, 250. 2 *Scam. Rep.*, 263.

All objections to the issuing or to the form of process, are to be taken advantage of the very first opportunity; and, if the defendant plead to the suit, or take any similar step which supposes the process to be valid, he cannot afterwards object to the process itself. 1 *Scam. Rep.*, 250, 266.

But the appearing at the return of the process for the purpose of making an objection, is not a waiver of it; for, if this was the case, there could be no such thing as an objection to process. 14 *Johns. Rep.*, 481.

The return made by an officer upon process is conclusive between the parties in the suit, and cannot be traversed.

If the constable shall return falsely, an action would lie against him at the suit of the party injured; 14 *Johns. Rep.*, 481; and should he do so wilfully and corruptly, he might also be indicted for a misdemeanor. *Penn. on Small Causes*, 21.

But the defendant cannot take advantage of the falsity of the return, in the cause in which it is made. The return is the evidence upon which the statute authorizes and requires the justice to proceed. He must, therefore, obtain jurisdiction of the defendant's person by virtue of the return, and the judgment, which may be subsequently rendered, will protect the magistrate, the party, and the officer who may be instrumental in enforcing it. It is conclusive upon the defendant so far as the proceedings in that suit are concerned. He cannot traverse the truth of it by plea in abatement, or otherwise. 3 *Wend. Rep.*, 202.

It is not lawful to break open an outer door or window of a dwelling house to execute civil process; but, if the officer find the outer door open, or it be opened to him from within, and he enter peaceably, he may break open any inner door to execute the process, after having demanded admission and stated his object, and admission has been refused. 5 *Johns. Rep.*, 352. 17 *Johns. Rep.*, 127.

Where the party whom the officer is directed to arrest is in the house of a third person, the officer may justify breaking open the outer door of the house, after request and denial in order to serve the process. 5 *Johns. Rep.*, 352, *note* (*a.*)

In order to execute civil process, an officer may break open a store, warehouse, or barn not annexed to a dwelling house nor forming any part of it. 16 *Johns. Rep.*, 287.

Process can neither be executed nor issued on a Sunday. 12 *Johns. Rep.*, 178. This decision was made under a statute

of New York, which was taken from the statute of the 29 Charles II., previous to which ministerial acts might be lawfully executed on Sunday, and arrests on that day were valid. 9 *Coke*, 68. 8 *Cowen's Rep.*, 27.

If a person arrested on civil process escape from the officer, he may be retaken on Sunday; and, in such case, the officer may break open an outer door in order to retake him, after a demand and refusal. 7 *Johns. Rep.*, 155.

The parties to a suit and their witnesses, and all persons who have any relation to a cause which calls for their attendance in court, are protected from arrest on civil process in coming to, attending upon, and returning from court, or on a matter of arbitration referred to a private arbitrator. 3 *Chit. Gen. Pr.*, 330. So is a person attending court under a recognizance. 7 *Johns. Rep.*, 538. All persons who have any relation to a suit, are entitled to this privilege, provided they come in good faith; and the same immunity is extended to parties or witnesses attending before referees or arbitrators under a rule of court. 7 *Johns. Rep.*, 538, *note* (*a.*) 1 *Caine's Rep.*, 116.

By statute, judges, counsellors or attorneys, clerks, sheriffs, or other officers of the several courts within this state, shall be privileged from arrest while attending courts, and while going to and returning from court. *Gale's Stat.*, 82.

"All grand and petit jurors shall be privileged from arrest in all cases, except for treason, felony, breach of the peace, or other criminal offences, during their attendance at court, going to and returning from the same; allowing one day for every twenty miles from and to their several places of abode; and all arrests, in such cases, shall be deemed as illegal and void." *Gale's Stat.*, 398.

"Electors shall, in all cases, except treason, felony or breach of the peace, be privileged from arrest during their attendance at elections, and in going to and returning from the same." *Art. II. Sec.* 29 *of the Constitution of this state.*

The privilege above mentioned, it will be noticed, is a privilege from arrest only. Such persons will, therefore, be liable to the service of process which is served without an arrest, as a summons, &c.

Gale's Stat., 412. "Sec. 51. Any justice of the peace may appoint a suitable person to act as constable in a criminal or other case, where there is a probability that a person charged with any indictable offence will escape, or that goods and chattels will be removed, before application can be made to a qualified constable; and the person so appointed, shall act as constable in that particular case, and no other; and any temporary appointment so made as aforesaid, shall be made by a written endorsement, under the seal of the justic, deputing, on the back of the process, which the person receiving the same shall be deputed to execute."

The appointment of a constable *pro tem.* by a justice of the peace to execute process under the statute, must be made by endorsement on the process. An appointment upon a separate piece of paper, is not in compliance with the act.

The statute specifies but two cases in which a justice of the peace is authorized to appoint a constable *pro tem.* The one is to execute criminal process where the accused is likely to escape, and the other is to execute civil process where goods and chattels are about to be removed before an application can be made to a qualified constable. In the latter case, as a prerequisite to the power of appointment, it must be shown that the goods and chattels are about to be removed. A justice of the peace cannot appoint a constable *pro tem.* to serve a summons or other personal notice in a civil suit. The statute refers to an execution or attachment. 1 *Scam. Rep.*, 488.

7. OF SUITS INSTITUTED BY AGREEMENT OF PARTIES.

Gale's Stat., 409. "SEC. 19. If both parties agree to have a difference decided by a justice of the peace, without process, he shall enter the same on his docket, noting particularly such consent, and proceed as in other cases."

In the case of Evans *v.* Pierce *et al.*, 2 *Scam. Rep.*, 468, Pierce sent a letter to a justice of the peace authorizing him to enter judgment against him in favor of Thomas for an amount named, stating that he waived the service of process. Upon which the justice rendered judgment in favor of Thomas. One of the questions in this case was in reference to the jurisdiction of the justice. Wilson, Chief Justice, said, "That he had jurisdiction of the subject matter of the suit, there is no doubt; but did he acquire jurisdiction over the person of Pierce by having him personally before him, or by legally notifying him of the proceedings against him in the manner required by law? A justice's jurisdiction is conferred by statute, and in its exercise he must proceed in strict conformity with the manner prescribed. Has that been done in this case? The statute directs that suits before a justice of the peace shall be commenced by summons, the form of which is given, and that it shall be served upon the defendant by reading it to him. Upon the return of this process, executed by the proper officer, or upon the parties appearing in person before the justice, and agreeing to waive process, he may proceed to hear and decide the cause. In this case, however, neither of the parties appeared and waived process, nor was there any process served. There was, therefore, neither cause nor parties legally before the justice to authorize his rendering judgment. The letter of Pierce did not warrant it, because the law having prescribed a different mode of acquiring jurisdiction of the person of the defendant, it must be strictly pursued, and cannot be varied at the will of the party or the

justice." Again he says: "Inasmuch, then, as the justice had no jurisdiction in the case of Thomas *v.* Pierce, his judgment in favor of the former was not merely voidable, but totally void."

8. OF SUITS INSTITUTED ON MOTION, &C.

Gale's Stat., 423. "SEC. 5. Justices of the peace who shall have given bond and received commissions under the provisions of this act, are authorized and empowered, and it is hereby made their duty to receive money on all notes and demands which may have been placed in their hands for suit or collection, and also upon all judgments rendered by them prior to issuing execution thereon; and upon the failure of such justice, after demand made to pay over any money, by him collected or received as aforesaid, to any person entitled to receive the same, his or her agent or attorney, such person may proceed against such justice in a summary way, either before a circuit court or some other justice of the peace of the county in which such first mentioned justice may reside, by motion, upon giving to such justice five days notice of the application and recover the amount so neglected or refused to be paid, with twenty per cent. damages thereon, for such detention, and shall have execution therefor: *Provided*, that in all such cases, if the said justice shall pay or satisfy the amount claimed by the party prosecuting with costs, under the direction of the court or justice, before final judgment, all further proceedings therein shall be stayed."

Sess. Laws, 1840, *p.* 78. "SEC. 2. Whenever in pursuance of the laws of this state, any judgment shall be had, or taken, against any sheriff, coroner, constable, justice of the peace, or probate justice of the peace, for any failure, neglect or refusal of such officer, to pay over any sum, or sums of money collected or received by him, in and by virtue of his office, and it shall appear to the satisfaction of the court, that proper demand for the same has been made, it shall be the duty of the court, or justice of the peace, before whom such judgment is had or taken, further to adjudge and decree that the office of such officer, so failing, neglecting, or refusing, as aforesaid, is forfeited and vacated, and such vacancy shall be filled as in other cases of vacancy, as is now provided by law."

The penalty given by sec. 11 of the "Act for the establishment of ferries," &c., *Gale's Stat.*, 308, may be recovered by motion before a justice of the peace of the proper county, upon giving the offender five days notice of the time and place of making such motion, which notice may be served on said offender, either in or out of the state, by delivering or tendering a copy thereof. *Breese Rep.*, *App.*, 10.

And by the 16th section, "If any person or persons not licensed to keep a ferry, &c., shall, at any time, pass any person

or persons, or their property, except as is provided in the ninth section, over, any lake, river, creek, or any other water course, where any ferry or toll bridge shall, at the time, be established, and kept, or within three miles thereof, either with or without compensation, with intent to injure the keeper or proprietor of such ferry, &c., he, she, or they shall incur the same forfeitures, and may be proceeded against in the same manner as is provided in the eleventh section."

It will be observed that the above sections have been amended so as not to apply to the Mississippi, Ohio, Illinois, or Great Wabash rivers, and so as to prohibit the running a boat, or erecting a toll bridge within *one* mile of an established ferry or toll bridge on any other river, creek, or water course. *Gale's Stat.*, 311.

9. OF SECURITY FOR COSTS BY NON-RESIDENTS.

Gale's Stat., 420. "SEC. 8. No person, who is not a resident of this state, shall hereafter commence any action before a justice of the peace, until such non-resident shall file with the justice before whom such action may be brought, a bond, with sufficient security, for the payment of all costs which may be awarded against the plaintiff, should he fail in his suit; which bond shall be in the following form, as near as may be, inserting the names of the parties, the county and state:

"'Sate of Illinois, } A. B. } Demand $
} *v.* }
County of——— } C. D. }

"'I, E. F., do enter myself security for all costs that may accrue in the above case, this——day of———18—.'

"Which bond shall be signed by the security; and if the said plaintiff shall be cast in his suit, discontinue, or make default, and shall not, within ten days thereafter, pay to the justice all the costs that may have been occasioned to the defendant, to the justice and constable, jurors or witnesses, the justice shall issue his execution against the security for the amount thereof, accompanied with a bill of costs, in which shall be set down every particular charged. And if any suit shall be commenced by a non-resident, as aforesaid, without filing a bond for costs, as aforesaid, the suit shall be dismissed on the motion of the defendant, and the plaintiff shall be liable to pay all costs occasioned thereby, which may be recovered before any justice of the county, in the name of the party injured."

A non-resident plaintiff cannot institute a suit before a justice of the peace until he has given a bond for costs, although he sues for the use of a resident. The statute in relation to costs in the circuit court in like cases, is different. 1 *Scam. Rep.*, 192.

CHAPTER III.

OF THE APPEARANCE OF PARTIES.

The appearance of parties is either in person or by attorney, or, in case of infancy, by next friend or guardian. 2 *Saund.*, 119, *f.*

A minor may commence a suit before a justice of the peace by his next friend, whenever his next friend shall have filed with the justice a bond acknowledging himself bound for all costs that may accrue and legally devolve upon such minor. *Gale's Stat.*, 537.

If an infant plaintiff appear by attorney, it must be pleaded in abatement, and is not a ground of nonsuit at the trial. 7 *Johns. Rep.*, 373.

In a suit against an infant, the plaintiff should be careful that a guardian is appointed for the defendant, for if no such appointment should be made, a judgment against the defendant would be erroneous. 2 *Saund.*, 212. 14 *Johns. Rep.*, 419.

If the infant defendant does not nominate a guardian, the justice may appoint such person as he may think proper, on the motion of the plaintiff.

The guardian should be a real person. 2 *Cowen Rep.*, 430.

If several defendants appear by attorney, and one is an infant, it is error, and as the judgment is entire, it shall be reversed against all. If a minor defendant appears by attorney, the court will, at the instance of the plaintiff, compel an amendment of the appearance by substituting a guardian, and although an infant defendant against whom judgment has been given, may assign for error that he appeared by attorney. 6 *Wend. Rep.*, 526.

Yet if a judgment be given in favor of an infant defendant, the plaintiff shall not avail himself of the infant's appearance by attorney as a ground of error. 2 *Saund.*, 212.

Even where an infant is sued as a co-executor with others, a guardian must be appointed. But where an infant sues as a co-executor with another, the executor of full age may retain an attorney for them both. 2 *Saund.*, 212.

By the common law, the next friend or guardian for an infant plaintiff, is liable for costs. *Willes Rep.*, 190. On motion of the defendant the court will not only require a *prochien amy*, or next friend, for an infant to be appointed, but they will compel such *prochien amy* to give security for costs to the defendant. Should the promise to pay costs be omitted, still the consent and appointment would be valid. 1 *Term Rep.*, 491. Should this be refused, however, the justice might also refuse to proceed, and nonsuit the plaintiff. It is now

provided by statute, *Gale's Stat.*, 537, sec. 2, that "Hereafter, minors may bring suits in all cases whatever, by any person that they may select as their next friend; and the person so selected shall file bond with the clerk of the circuit court, or justice of the peace before whom the suit may be brought, acknowledging himself bound for all the costs that may accrue and legally devolve upon such minor. And after bond shall have been so filed, said suit shall progress to final judgment and execution, as in other cases."

There is little doubt that judgment may go against an infant plaintiff for costs as well as damages, and that the defendant may elect either to collect the costs of the infant on execution, or pursue the *prochien amy* when he becomes regularly bound to pay the same, as he might do any other collateral security.

The *prochien amy*, or guardian of the plaintiff, is liable to the justice for his fees to the same extent a plaintiff would be liable in ordinary cases; and an action of assumpsit will lie for them. 2 *Esp. Rep.*, 473.

The order for the admission of a guardian for the defendant should be obtained before plea. 2 *Saund.*, 119.

A married woman, when she appears alone, must appear in person, but where husband and wife sue, or are sued, he may retain an attorney for them both. 2 *Saund.*, 212.

An idiot must appear in person, and any one may be admitted to sue or defend for him; but a lunatic must appear by guardian, if within age, 2 *Saund.*, 333, or by attorney, if of full age.

When an attorney commences an action in the name of another, or appears for another, the court will presume he has authority to do so until the contrary is shown; and if such suit be instituted, or appearance entered, without legal authority, the remedy is by motion to the court, founded on evidence, to shew the abuse (in acting without such authority) of the process of the court, or irregular act of the attorney in entering his appearance. 1 *Scam. Rep.*, 291. *Breese Rep.*, 258.

OF DEFAULT OR WANT OF APPEARANCE.

Gale's Stat., 404. "Sec. 6. If the plaintiff or his agent shall not appear at the time appointed for the trial aforesaid, and no sufficient reason shall be assigned to the justice why such plaintiff or his agent does not appear, the justice shall dismiss the suit, and the plaintiff shall pay the costs, unless the defendant shall consent that such suit shall be continued to another day, in which case, the same proceedings shall take place at the second day, so fixed for the trial as above provided; but this section shall not require the dismissal of a suit on a note placed in the hands of a justice for collection."

"Sec. 5. If the defendant shall not appear at the time of

trial, after giving bail as aforesaid, or after being served with a summons, as described in the third section of this act, and no sufficient reason be assigned to the justice, why he or she does not appear, then the justice shall proceed to hear and determine the cause, in the absence of said defendant, but shall not give judgment in favor of the plaintiff, unless the said plaintiff shall fully prove his demand in the same manner as if the defendant had been present and denied the same."

The omission of the defendant to appear and plead, is not considered as an admission of the plaintiff's demand, but he must establish it by testimony in the same manner as though an issue had been joined.

Strictly speaking, there is no such thing before a justice of the peace as a judgment by default, but always a trial, or a hearing in the nature of a trial.

Where the time of the appearance of the parties has been appointed by the justice, either in the process or by adjournment, he ought to wait a reasonable time for the appearance of either of the parties; and perhaps an hour's delay would not be deemed unreasonable.

CHAPTER IV.

OF PLEADINGS AND SET-OFF.

1. Of pleadings in general.
2. Of the declaration.
3. Of oyer.
4. Of pleas.
5. Of set-off.
6. Of replication.
7. Of demurrers.
8. Of pleas puis darrein continuance.
9. Of setting up or pleading title.

1. OF PLEADING IN GENERAL.

The parties having appeared, the next object of consideration is the pleadings in the cause. There is no statute requiring that the plaintiff should state his cause of action in writing before the justice, or that the defendant should state his defence in writing. For the purpose, however, of obtaining a

decision upon the disputed claim, the court must be informed in some manner of the matter in litigation, of the facts constituting the plaintiff's cause of action, and whether they are denied, or confessed and avoided. In the statement of the parties, there should be sufficient certainty to show that the subject matter is within the jurisdiction of the justice, and to avoid subsequent disputes about the nature of the action, the character of the defence, and what was admitted and what denied, so that the court may determine what evidence is admissible under the issue on either side.

The statement of the facts which constitute the plaintiff's cause of action, and the objections and statements constituting the defendant's grounds of defence, are called the pleadings of the parties. 1 *Chit. Pl.*, 244. And by that name it is presumed they are known by every person, however limited may be his acquaintance with proceedings in courts of justice.

The object of the legislature in establishing these courts, was to dispense with technical forms and pleadings, and to require causes to be disposed of with as little delay as possible. *Breese Rep.*, 96.

In the case of Legg *v.* Robinson, 7 *Wend. Rep.*, 196, Sutherland, Justice, says, that "Mere matter of form is not regarded in proceedings before justices of the peace. Any statement of the cause of action or of the defence which fairly apprises the opposite party of the ground relied upon, either to support or defeat the action, is sufficient. The name by which any thing may be called, is not in these cases material, if the thing itself is right. The mistake in the name is not calculated to mislead. Technical niceties will not be exacted, but parties must be held to a plain and intelligible statement of their cases. There is no difficulty in this ; any man however unlettered is capable of doing it."

In proceedings before justices of the peace, a party is bound to avail himself of the first opportunity to take advantage of a defence which is of a dilatory character. *Breese Rep.*, 96. 1 *Scam. Rep.*, 554.

Objections in the nature of a plea in abatement, must be made in the first instance. It is too late to make them on appeal. 1 *Scam. Rep.*, 266.

A party will not be permitted to conceal mere technical objections, and then, after the trial has begun, to raise them. *Breese Rep.*, 96.

Where a suit is commenced by a plaintiff in a particular character, if the defendant wishes to contest the plaintiff's right to recover in that character, the objection must be made by way of plea in abatement. As where the plaintiff sues as administrator, he is not required to prove that he is entitled to sue in that character, unless it is objected on the trial that he is not administrator. 2 *Scam. Rep.*, 63.

Gilliam and Challen sued Luston before a justice of the

peace, and recovered judgment. Luston appealed to the circuit court, and there on the trial, after the plaintiffs had introduced their evidence and rested their cause, the defendant moved to dismiss the suit because the contract appeared to have been made by the defendant and one P. M. Brown with the plaintiffs, which motion was overruled and judgment rendered for the plaintiffs. On error to the supreme court, Smith, Justice, says that "if the parties were only liable, the plaintiff in error (defendant below) should have pleaded the matter in abatement." 1 *Scam. Rep.*, 577.

In the case of Murry *v.* Crocker, 1 *Scam. Rep.*, 212, Smith, Justice, in delivering the opinion of the court, says: "This was an action instituted originally before a justice of the peace and taken by appeal to the circuit court. The only question presented by the pleadings in this case arises on the note, which contained a provision that if the amount was not paid when it became due, then interest was to be paid therefor at the rate of twenty per cent. until paid. The circuit court rendered judgment with interest at the rate of six per cent. per annum, and to this judgment the defendant objects, alleging that the contract was an usurious one. The pleadings do not show that the question of usury was ever raised in the circuit court, or before the justice. The statute relative to usury provides that if it shall appear to the court before which the action shall be tried, by the pleadings in the case, and on the application of the defendant, that a greater rate of interest shall have been reserved or taken than is reserved by the act, the defendant shall recover his full costs, and the plaintiff shall forfeit three-fold the amount of the whole interest reserved, and the plaintiff shall have judgment only for the balance. Now, in this case it neither appears by the pleadings in the case that the question of usury was raised, nor that an application contemplated by the act was ever made; consequently this court cannot consider the point in any way before the court for its adjudication. Why the circuit court changed the rate of interest we cannot collect from the record, but as the reduction of the rate of interest was in favor of the plaintiff in error, he cannot surely object to the judgment below for that cause. The judgment of the circuit court is affirmed with costs."

The statute has provided that in a suit before a justice of the peace, any party who may feel aggrieved by the judgment rendered against him, may appeal therefrom to the circuit court of the county in which the judgment was rendered. When the cause is removed into the circuit court, it stands for trial in the same condition it was in when tried before the justice. It is important, then, to the parties in suits before justices of the peace, that the cause of action as well as the defence should be stated with sufficient certainty to the justice, and by him noted in the docket, so that when the cause shall

have been removed into the circuit court, it can there be ascertained what there is in issue between the parties to be tried.

It has been supposed by some that it was not the intention of the legislature to authorize pleadings of any kind before justices of the peace, but that, on return of process served, the parties should appear and try all claims, demands, and causes of action existing between the parties which come within the jurisdiction of the justice, without informing the opposite party or the justice, previous to the entering upon the trial, of the nature of the matters in controversy, and the point in issue, or question between the parties. If such an opinion is based upon the supposition that these magistrates are not qualified to decide upon matters of this kind, experience seems to prove it to be erroneous, as there is no difficulty in procuring incumbents who are qualified, although it is an office which requires the exercise of an intelligent and liberal mind.

So far as there has been a judicial expression, it appears that all objections to the opposite party's proceedings, allegations, statements, or defence, must be made in the order of pleadings, or the objections will be considered as waived.

The only pleadings which often occur in courts held by justices of the peace, are the declaration, plea, and set-off, and sometimes replications and demurrers. Beyond these, it is not presumed that the pleadings will ever extend, and to these the observations will be principally confined.

2. OF THE DECLARATION.

The declaration is a statement of the facts which constitute the plaintiff's cause of action. The general requisites of a declaration are:

First. That it corresponds with the process.

Secondly. That it contain a statement of all the facts necessary in point of law to sustain the action, and nothing more. 1 *Chit. Pl.*, 278.

First. The declaration should correspond with the process in the name of the parties. The case of a defendant sued by a wrong name and appearing in his right one, is an exception to this rule. The plaintiff may, in such a case, declare against him by the name in which he appears, stating that he was arrested or served with process by the other; for, by appearing, the defendant admits himself to be the person sued, and so the variance is immaterial. 1 *Cowen Rep.*, 37.

The declaration should, in all cases, correspond with the process in the number of the plaintiffs. Thus, if the process be in the name of one plaintiff, the declaration cannot be made in the name of two or more; and if the process be in the name of two or more, the declaration cannot be in the name of one. 1 *Chit. Pl.*, 282. 2 *Scam. Rep.*, 508.

And so of the defendants, it would seem, in the warrant or

attachment, which is in the nature of bailable process in a court of record. 4 *Term Rep.*, 697. 1 *Bos. & Pul.*, 49. 4 *East*, 589.

It appears that, by the common law, the plaintiff may join any number of defendants in a process not bailable, and declare against them severally, or against some, omitting the others. 1 *Chit. Pl.*, 283. 3 *Johns. Rep.*, 538. 1 *Cowen Rep.*, 193.

It is provided by sec. 7 of the "Act concerning justices," &c., that "If two or more persons shall be sued jointly, before any justice of the peace, and all of such defendants shall have had notice as aforesaid, by warrant or summons, the appearance of any one of the said defendants, at the time of trial, shall be sufficient to justify the said justice in proceeding as if all were present; and if none of said defendants shall appear after such notice, the justice shall, if the plaintiff's demand be established as aforesaid, proceed as in other cases of default; and in either of the aforesaid cases, the justice shall not divide the amount of the debt proved among the defendants, but shall give one entire judgment for the whole amount proved to be due against so many of the defendants jointly, as shall be proved to be jointly indebted to the plaintiff. But if it shall appear to the justice, that any two or more of the defendants are severally indebted to the plaintiff, upon separate and different debts, or causes of action, or upon several or different promises or contracts, such plaintiff shall not be allowed to prosecute his suit against such defendants jointly. When there are several joint debtors and all cannot be served with process, the justice may render judgment against such as are served with process." *Gale's Stat.*, 404.

The case of Maxey *v.* Padfield, 1 *Scam. Rep.*, 590, was commenced by summons before a justice, against McCullough and Maxey, upon a note made by McCullough and endorsed by Maxey to Padfield, which was served upon Maxey only. Neither of the defendants appeared, and judgment was rendered against them by default. Maxey appealed to the circuit court, where, on motion, the papers were amended by striking out the name of McCullough, and judgment rendered against Maxey, who removed the same to the supreme court by writ of error. Smith, Justice, who delivered the opinion of the court, said: "The assignment of errors questions the regularity and power of the court to strike out the name of one of the defendants in the action before the justice of the peace. The original summons was the foundation of the action. The plaintiff in that action elected to misjoin parties who, upon no legal principles, could be joined in the same action, and the judgment was manifestly erroneous as well for the misjoinder as for rendering judgment against McCullough, who had not been served with process. We cannot doubt that the court had no power to abate the suit as to one of the defendants at common law on the plaintiff's motion, and we do not conceive

that the statutes allowing of amendments relative to proceedings before justices of the peace, confer the power. The effect of the amendment is to change the character of the action as to the parties, and virtually to constitute a new action. This, surely, could not have been the intention of the legislature in the several acts allowing amendments in the circuit courts to proceedings had before justices of the peace.

"The defendants might avail themselves of this misjoinder, but surely the plaintiff in the action before the justice could not discontinue his cause as to one of them, and hold the other liable. The cases cited to support the power to thus amend process, we conceive have no bearing on the point before the court, and do not countenance the amendment. The judgment is reversed, as well in regard to the proceedings and judgment before the justice as in the circuit court, with costs."

Where the suit is commenced by attachment, it appears to be clear that the plaintiff must declare against all the defendants. The condition of the bond to be given by the applicant seems to require this.

In all actions of trespass or trover, if process be issued against two and served on one only, the plaintiff may declare and proceed to judgment against him alone without noticing the others. 2 *Johns. Rep.*, 365.

Upon process not bailable, and which does not specify the character or right in which the plaintiff sues, he may declare *qui tam*, or as executor, or administrator, or asssignee, or in any other special character, for this does not tend to enlarge but to narrow the demand which the defendant was called upon to answer; but if the plaintiff be described in the process as suing in a special character, and he declares generally, the proceedings will be set aside as irregular. So when the defendant is described in the process generally, he may be declared against as administrator, the object of the writ being merely to bring him into court. But where the process is to answer the plaintiff in a special character or right, as if the process describe him as suing *qui tam*, or as executor, or assignee of a bankrupt, the declaration can only be in the same character, and the plaintiff cannot declare generally. 1 *Chit. Pl.*, 284.

By the rules of the common law, the plaintiff may declare in any form of action where the process was not bailable, although the process be in trespass. But in bailable actions, where the process requires the defendant to be held to bail, the declaration must correspond with the cause and form of action in the process. 1 *Chit. Pl.*, 285. If the plaintiff, in such a case, in his declaration varies the matter of the action, it is an irregularity of which the defendant may take advantage, on motion to set aside the proceedings. 4 *Johns. Rep.*, 485.

The statute, however, appears to contemplate that the

summons or warrant shall express the true character in which the plaintiff sues, and the character in which the defendant is sued, and shall contain the true cause of action, so that the defendant may know for what, and for whose benefit, he is sued, and the justice is required to endorse on the summons or warrant the sum demanded by the plaintiff, with the costs due thereon, so that the defendant may pay the same and prevent the further accumulation of costs. This object would be defeated, were the plaintiff permitted to sue out process in his own right and then declare on or present a claim in a special character *qui tam*, or as executor, administrator, or assignee, or to sue out process against the defendant generally and then present a claim against him as administrator, or to sue out process in one form of action and then to declare for another and different cause of action.

Secondly. As to the facts necessary to be stated, it will appear from the observations made in the commencement of this chapter, and the authorities there cited, that all that is required in a declaration in a justice's court, is a plain and concise statement of the facts on which the plaintiff's claim is founded; and that the form in which the statement is made is not to be regarded.

And yet, while pleadings before justices of the peace should be viewed with liberality, enough should appear from the statement of the plaintiff that the subject matter, or cause of action, is within the jurisdiction of the justice, and to enable the defendant to answer and defend.

In Houghton *v.* Strong, 1 *Caine's Rep.*, 486, the declaration was "That the defendant privily, wilfully, and maliciously, by certain conduct, damaged the plaintiff to the amount of twenty-five dollars," and it was held bad. The court says that "It ought to have stated not only the injury, but how it arose. Unless the cause of action be stated with certainty, it is impossible for us to know whether the justice had jurisdiction or not. This very suit may, for ought that appears, have been for slander or for assault and battery, or for some other matter not cognizable before a justice."

In King *v.* Fuller, 3 *Caine's Rep.*, 152, the declaration was that the plaintiff "let the defendant have a certain bay horse and a note of hand of sixteen dollars, in consideration of which the defendant let the plaintiff have a certain sorrel horse, which the defendant warranted to be sound, and a good working horse, whereas he was totally unfit for all manner of business, to the damage," &c. This declaration was held to be sufficient.

In Keyser *v.* Shafer, 2 *Cowen Rep.*, 437, on *certiorari* to a justice's court, Shafer declared against Keyser thus: "Plaintiff declares against the defendant for one barrel of salt, $5.00." On general demurrer, this declaration was held to be sufficient.

When a suit is commenced upon a note or other instrument in writing, it is customary, and undoubtedly sufficient, for the plaintiff to exhibit the note or writing, accompanied by such verbal statements as may be necessary.

It is provided by sec. 3 of "An act authorizing the seizure of boats and other vessels by attachment in certain cases," that "Upon the return of such attachment, the person or persons having demands of the description aforesaid, and for whose benefit such attachment was issued, shall file a written declaration or statement, against such boat or vessel, by her name or description, or against the owner or owners, if known as aforesaid, briefly reciting the nature of the demand, whether for work done, or materials, firewood, or supplies of provisions furnished, and whether at the request of the owner, master, supercargo, or consignee of such boat or vessel, and that such demand remains unpaid; annexing to such declaration or statement, a bill of the particulars constituting such demand in separate and distinct items; and the like proceedings shall be had in all other respects, and the like judgment and execution, as in other cases of attachment." *Gale's Stat.*, 73.

3. OF OYER.

If the plaintiff's claim is founded on a bond or other sealed instrument, the defendant, before pleading, may crave *oyer*, that is, to hear it read to him; 3 *Bl. Com.*, 299. 12 *Johns. Rep.*, 401; and in cases where he is entitled to oyer, he is not bound to plead until such oyer is granted. 1 *Chit. Pl.*, 464. But if the deed has been lost or destroyed, or is in the hands of the defendant, the plaintiff should state the facts relative thereto in declaring, and in that case the defendant will not be entitled to oyer. 1 *Saund.*, 9. 6 *Cowen Rep.*, 748.

In courts of record, upon the demand of oyer, the plaintiff's attorney delivers to the defendant's attorney a copy of the instrument of which oyer is demanded. 1 *Chit. Pl.*, 463, *note g.*

But in justices' courts, upon a demand of oyer, the proper course would be to produce the instrument itself, and to exhibit it to the party demanding oyer of it, or read it to him if required. The plaintiff also, in like manner, is entitled to oyer of any sealed instrument necessarily stated in the defendant's plea. 1 *Saund.*, 9.

4. OF PLEAS TO THE JURISDICTION AND IN ABATEMENT.

Pleas are of two sorts, dilatory pleas and pleas to the action. Dilatory pleas are such as tend merely to delay and put off the suit, by questioning the propriety of the remedy rather than denying the injury. Pleas to the action are such as dispute the very cause of suit. 3 *Bl. Com.*, 301.

I. Of dilatory pleas, or pleas in abatement.
   1. To the jurisdiction.
   2. To the disability of the person.
   3. To the process.

II. Of pleas in bar.

By this order of pleading, each subsequent plea admits that there is no foundation for the former. As where the defendant pleads to the person he admits the jurisdiction of the court, and where he pleads to the process he admits the competency of the plaintiff and his own responsibility, and where he pleads in bar of the action he admits that there is no foundation for any dilatory plea. 1 *Chit. Pl.*, 474.

1. *Of dilatory pleas, or pleas in abatement.*

The general rule in cases of dilatory pleas is, that if the party does not avail himself of it the first opportunity, he waives the objection. 1 *Scam. Rep.*, 554. A plea in abatement cannot be pleaded after a plea in bar, nor with it. 2 *Cowen Rep.*, 417. 13 *Wend. Rep.*, 285.

1. *To the jurisdiction.* Objections to the jurisdiction of a justice may, in some instances, be taken under the general issue, or in any stage of the suit where the want of jurisdiction appears; as when the debt claimed by either party is proved on the trial to be over one hundred dollars, and it is not reduced below that sum by fair credits; or where the cause of action is not within the jurisdiction of the justice; or where an executor or administrator is a party, and the sum demanded exceeds twenty dollars for a consideration other than for proprety purchased at an executor's or administrator's sale; or where a suit is commenced by attachment for a sum exceeding fifty dollars; or where the damages in an action of trespass on personal property, or in trover, exceeds twenty dollars. Yet, in these cases, the defendant may plead the want of jurisdiction.

Whenever the subject matter of the plea, or defence, is that the plaintiff cannot maintain any action at any time in respect of the supposed cause of action, it may, and usually should, be pleaded in bar; but matters which merely defeat the present proceedings, and do not show that the plaintiff is forever concluded, should in general be pleaded in abatement. 1 *Chit. Pl.*, 481.

2. *To the disability of the person.* Pleas in abatement to the disability of the plaintiff are, that he is not in existence, (being only a fictitious person, or dead;) 19 *Johns. Rep.*, 308; that the plaintiff is an infant, and has commenced the suit in person or by attorney, and not by next friend; 7 *Johns. Rep.*, 373; or that the plaintiff is a married woman, and has sued without her husband. 1 *Chit. Pl.*, 483.

And in an action by several plaintiffs, the defendant cannot

avail himself of the fact of the decease of one of the plaintiffs before the commencement of the suit except, by a plea in abatement. 2 *Scam. Rep.*, 509.

Pleas in abatement to the person of the defendant are that the defendant is an infant, or is a married woman, and is sued without her husband. 1 *Chit. Pl.*, 484. A person privileged from arrest, may plead the privilege in abatement, or he may move to be discharged from the arrest. 1 *Tidd's Pr.*, 183. 2 *Wend. Rep.*, 257.

3. *To the process.* Pleas in abatement to the process are various: as misnomer of the plaintiff or defendant; that the plaintiffs or defendants suing or being sued as husband and wife, are not married; that one of the plaintiffs or defendants is fictitious, or was dead at the time of the commencement of the suit, or any other plea for want of proper parties, as that there are other joint contractors, and other executors, or administrators, trustees, or other persons not joined, who ought to be made parties to the suit. 1 *Chit. Pl.*, 486–7.

The plea in abatement of non-joinder must aver that the party omitted is still living. 1 *Saund.*, 291, *a*, *note* 2.

In actions on contract, as debt and assumpsit, the non-joinder of a party who ought to have been made a co-plaintiff, will, in general, be a ground of nonsuit, and need not, though it may, be pleaded in abatement. But in the case of executors and others suing in the right of another, the omission can only be pleaded in abatement, but the non-joinder of a co-plaintiff in an action, in form of *ex delicto*, as trespass or trover, can only be taken advantage of by plea in abatement. 1 *Chit. Pl.*, 487.

With regard to defendants, the omission of a joint contractor must be pleaded in abatement. 1 *Scam. Rep.*, 577. 1 *Saund.*, 291, *d*. But in actions for *tort*, no advantage whatever, in general, can be taken of the non-joinder of other persons. 2 *Johns. Rep.*, 382. 1 *Saund.*, 291, *k*.

It may also be pleaded in abatement, that there is another action depending for the same cause before the same or another justice, or before another court; 3 *Johns. Rep.*, 259; but in a penal action, the pendency of a suit by another person for the same penalty, may be pleaded in bar, because the party who first sues is entitled to the penalty. 1 *Chit. Pl.*, 488.

The leading distinction between a plea in abatement and a plea in bar is, that the former must not only point out the plaintiff's error, but must show him how it may be corrected, and furnish him with materials for avoiding the same mistake in another suit in regard to the same cause of action. 1 *Chit. Pl.*, 481.

The utmost strictness is required in pleas in abatement. They are dilatory pleas, and looked upon with suspicion. They will not be sustained by any intendment in their favor. 13 *Wend. Rep.*, 495.

The defendant may also plead in abatement any irregularity in the issuing of process, or the service thereof, when it appears by the return of the officer; or he may apply to the justice to set aside the proceedings on account of such irregularity.

A plea to the jurisdiction is a plea in abatement, and advantage may be taken of an objection to the jurisdiction, by an application to the justice to set aside the proceedings. If the defendant claim an exemption from arrest, or prosecution, on account of being privileged therefrom, instead of pleading in abatement, he may apply to the justice to dismiss the suit. In cases where it may be done, it would usually be more advantageous for the defendant to apply to set aside the proceedings or dismiss the suit, than to plead in abatement; and, perhaps, this course would be the most proper in a justice's court, as the object of the legislature appears to have been to dispense with special pleading as far as practicable. For if the party plead in abatement, and the plaintiff deny the fact so pleaded, the judgment thereon, if in favor of the plaintiff, would be final, and the defendant could not put in any other plea; but in the case of an application to set aside the proceedings, or dismiss the suit, if the application should be denied, the defendant would still be at liberty to plead to the action.

If the ground of the objection do not appear upon the face of the proceedings, or the facts be not admitted, the application is to be founded upon the affidavit or oath of the party, or of a third person, and the affidavit or oath of the plaintiff or a third person may be taken in opposition to an application, and when the facts are ascertained, the justice is to decide thereon and either grant or refuse the application.

When misnomer of the defendant is truly pleaded, the plaintiff may amend his declaration, for the defendant who pleads a misnomer in abatement must set forth the true name, or he may reply that the defendant is known as well by one name as the other. 1 *Chit. Pl.*, 281, 486.

Where the non-joinder of several defendants is pleaded, the plaintiff cannot amend, though the statute of limitation will otherwise attach. 8 *Cowen's Rep.*, 122.

If the plea be untrue in fact, the plaintiff should deny it by replication; or if it be insufficient in point of law, he may demur. 1 *Chit. Pl.*, 498.

If an issue in fact be joined on a plea in abatement, and found for the plaintiff, the judgment is final that the plaintiff recover; but if there be judgment in favor of the plaintiff, on demurrer to a plea in abatement, or replication thereto, the judgment is that the defendant answer over, that is, plead again. 1 *Chit. Pl.*, 500.

The judgment for the defendant on a plea in abatement, whether it be on an issue in fact or in law, is that the writ or bill be quashed; or if a temporary disability or privilege be

pleaded, that the plaint remain without day. 1 *Scam. Rep.*, 319.

Where the defendant pleads in abatement, and the plaintiff takes issue upon it, and it is found against the defendant, the judgment is final, and if the cause is tried by the justice, he must proceed to assess the damages, or if it was tried before a justice and a jury, the same jury must assess the damages. 6 *Wend. Rep.*, 649.

2. *Pleas in bar.*

Pleas in bar go to the merits of the case, and deny that the plaintiff has any cause of action, and do not, like pleas in abatement, give a better process. They show that the plaintiff never had any cause of action, or, admitting that he had, insist that it is determined by some subsequent matter. 1 *Chit. Pl.*, 501.

In actions upon contracts the grounds of defence are, that there was no contract between the parties in point of fact; 3 *Bl. Com.*, 305; or if there was, it was void or voidable in point of law; or if there was a good and valid contract, that it has been performed, or if not, that there is some legal excuse for the non-performance of it. 1 *Chit. Pl.*, 511. Upon these grounds it will appear that the plaintiff never had any cause of action, or admitting that he had, it may be discharged by some subsequent matter, as by accord and satisfaction, payment, arbitrament, release, &c. 1 *Chit. Pl.*, 512.

In actions for wrongs, the defendant may show that the plaintiff never had any cause of action by denying the charge, or by justifying or excusing it, or he may discharge the action by accord and satisfaction, arbitrament, release, &c., as in actions upon contracts. *Tidd's Pr.*, 590.

Where the defendant means to deny the whole charge contained in the declaration, or that which constitutes the gist or foundation of the action, he should plead the general issue as in assumpsit, *that he did not promise*, &c.; in debt, *that he does not owe the debt;* in debt on specialty, *that the instrument is not his deed;* in debt on record, *that there is no such record;* and in trespass or trover, *not guilty. Tidd's Pr.*, 591. *Jac. Law Dic., title Plea.*

Under the general issue in an action of assumpsit, the defendant may give in evidence that another person ought to have been made co-plaintiff; that at the time the supposed contract was entered into, the defendant was an infant, a lunatic, or drunk, or a married woman, or under duress. So a release or parol discharge before breach, or an alteration in the terms of the contract, or non-performance by the plaintiff of a condition precedent, or that the contract has been performed by payment, &c., or that it afterwards became illegal, or that it was impossible to perform it, may, when they constitute a sufficient defence, be given in evidence under this

plea. 1 *Chit. Pl.*, 512. So the defendant may show, under the general issue, that he offered to perform his part of the contract, but was prevented by the plaintiff. 13 *Johns. Rep.*, 56.

These defences show that the plaintiff never had any cause of action.

But most matters in the discharge of the action, or which have occurred since the making of the contract, may, in assumpsit, be given in evidence under the general issue, as payment, accord and satisfaction, arbitrament, a higher security given, and release. 1 *Chit. Pl.*, 512. 7 *Cowen Rep.*, 278.

There are, however, some defences which, in assumpsit, must be pleaded specially, as a tender, set-off, and the statute of limitations. 1 *Chit. Pl.*, 514.

So a defendant cannot avail himself of the statute against usury, unless the same be pleaded. 1 *Scam. Rep.*, 212.

So the defendant must plead a former recovery; 10 *Johns. Rep.*, 111. 1 *Chit. Pl.*, 513, *note g.* 12 *Johns. Rep.*, 455; or a former suit between the same parties, in which the plaintiff's demand ought to have been set-off. *Gale's Stat.*, 406, § 16. 1 *Johns. Rep.*, 283. 5 *Johns. Rep.*, 129. 6 *Cowen's Rep.*, 691.

To render a former trial a bar in a subsequent suit for the same matter, there should ordinarily be a trial and judgment on the merits. A judgment of nonsuit is not a bar to a subsequent suit. 10 *Johns. Rep.*, 363. 1 *Scam. Rep.*, 152.

Where there is a trial of a cause before a justice without a jury, the plaintiff may elect to become nonsuit at any time before it is finally submitted for the judgment of the court; but after the cause is finally submitted, he cannot become nonsuit or withdraw his suit; and it would be a bar to any subsequent suit for the same matter, although the justice would not render any judgment thereon. 11 *Johns. Rep.*, 457. The maxim, *no one ought to be twice vexed for the same cause*, is applicable. 10 *Wend. Rep.*, 519.

A justice is bound to give judgment according to the verdict of the jury, and a plea of a verdict in a former suit for the same cause, is a good defence, although no judgment was rendered, for the justice is bound to give judgment on the verdict, and cannot arrest it, or grant a new trial. 2 *John's. Rep.*, 181, 191. *Gale's Stat.*, 405, § 9.

Where a suit is brought before a justice of the peace which terminates in a final judgment on the merits, then both parties shall be precluded from further litigation in relation to all matters that might have been decided in that case. 1 *Scam. Rep.*, 152.

From the loose manner of pleading in justices' courts, it must often be almost impossible, from the mere papers, proceedings, and record, to preserve the identity of actions, as the plaintiff may, in some cases, elect to bring one of the several kinds of actions for the same injury. It has been decided in the case of Rice *v.* King, 7 *Johns. Rep.*, 20, that if the

plaintiff bring one kind of action, and judgment be given against him, this may be pleaded in bar to another description of action for the same cause; and it has been established as a rule on the subject of this plea, that the *same cause of action* is when the evidence will support both actions in a different form, thereby making the evidence given in the first action the test of identity in the second.

The defendant is at liberty to plead any matter that does not amount to the general issue, and which admits that, in fact, a contract was made, but insists that it was void or voidable, or has been discharged. 1 *Chit. Pl.*, 515.

Gale's Stat., 526. "Sec. 5. In any action commenced, or which may hereafter be commenced, in any court of law in this state, upon any note, bond, bill, or other instrument in writing for the payment of money or property, or the performance of covenants or conditions by the obligee or payee thereof, if such note, bond, bill or instrument in writing was made or entered into without a good or valuable consideration; or if the consideration upon which such note, bond, bill, or instrument in writing was made or entered into, has wholly or in part failed, it shall be lawful for the defendant or defendants against whom such action shall have been commenced by such obligee or payee, to plead such want of consideration, or that the consideration has wholly, or in part failed; and if it shall appear that any such note, bond, bill, or instrument of writing was made or entered into without a good or valuable consideration, or that the consideration has wholly failed, the verdict shall be for the defendant; and if it shall appear that the consideration has failed in part, the plaintiff shall recover according to the equity of the case: *Provided*, that nothing in this section contained shall be construed to affect or impair the right of any *bona fide* assignee or assignees, of any instrument made assignable by this act, where such assignment was made before such instrument became due.

"Sec. 6. If any fraud or circumvention be used in obtaining the making or executing of any of the instruments aforesaid, such fraud or circumvention may be pleaded in bar to any action to be brought on any such instrument so obtained, whether such action be brought by the party committing such fraud or circumvention, or any assignee or assignees of such instrument."

In the case of Sims *v.* Kline, *Breese Rep.*, 234, Wilson, Chief Justice, in delivering the opinion of the court, says: "This is an appeal from a judgment of the Morgan circuit court. The action was commenced in the court below by Kline against Sims upon a note under seal. The defendant filed two pleas, both of which were demurred to and the demurrer sustained by the court, and judgment rendered for the plaintiff upon the note, from which judgment Sims appealed to this court, and now assigns for error the decision of the court in sustaining the demurrer

to the pleas. The first plea alleges that the note upon which the suit was brought was obtained by fraud and circumvention, and charges the fraud and circumvention to consist in the plaintiff representing himself to be the owner of a hundred head of hogs and fifty four head of cattle running in the neighborhood of his farm, and that they were worth three hundred dollars, being the property for which the note was given, when, in truth, the plaintiff had not that number of hogs and cattle, nor were they good and valuable as represented.

"The court recognizes the principle that fraud vitiates and renders void every contract by which it is obtained, but every false affirmation does not amount to a fraud. A knowledge of the falsehood of the representation must rest with the party making it, and he must use some means to deceive or circumvent. This plea contains no charge of this kind. It only alleges the number and value of the cattle and hogs to be less than was represented by the plaintiff, Kline. As regards their value, that was already a matter of opinion, and by an ordinary degree of precaution, the defendant might have ascertained the number. To this plea, then, the demurrer was properly sustained.

"The second plea is of a two-fold character. It commences as a plea of part failure of consideration which goes to only a portion of the action, and concludes as a plea of fraud, which is a defence to the whole action. It contains two distinct grounds of defence which, if properly pleaded, though in the same plea, could not, for its duplicity, be taken advantage of upon general demurrer. But is it not defective in substance? The statute under which this plea is filed, enumerates four grounds of defence to an action upon bonds or other writings for the payment of money, &c.

"1. Where the bond is entered into without any good or valid consideration.

"2. Where the consideration has wholly failed.

"3. Where fraud and circumvention have been used in obtaining it. And,

"4. Where there has been a part failure of the consideration.

These are all separate and distinct grounds of defence, and should be so pleaded. If a bond is given without any good or valuable consideration, the fact may be pleaded generally. If fraud is relied upon, the plea must set forth facts which constitute fraud.

"If a total failure of consideration is relied on, the manner must be shown, and where a partial failure of consideration is relied on, as is the fact in this case, it is necessary to set forth in what the failure consisted. The plea should be as broad as the evidence, and upon the same principle the extent of the failure of the consideration should be specially alleged. The plea in this case alleges fraud, but does not specify in what;

it also alleges a part failure of consideration, and does partially show in what it consisted, but the extent is not specified: in this respect the plea is substantially defective. Precision as to the extent of the failure of the consideration is essential, in order to enable the court to render judgment for the residue. The judgment of the court below is affirmed."

The consideration of a negotiable note cannot be impeached in the hands of an innocent assignee who received the note before it became due. The fraud which will vitiate a note in the hands of an innocent assignee, transferred before due, must be in obtaining the making or executing of the note. Fraud in relation to the consideration, or in the contract upon which the note is given, is not sufficient. 1 *Scam. Rep.*, 583.

A part failure of consideration cannot be given in evidence under the general issue and notice of set-off predicated upon an entire failure of consideration. 2 *Scam. Rep.*, 505.

In regard, however, to contracts, other than those mentioned in the statute, the rule seems to be that where the defence goes to the whole cause of action, it may be given in evidence under the general issue, but if the defence goes only to a part of the cause of action, it should be specially pleaded. 8 *Wend. Rep.*, 109. 1 *Scam. Rep.*, 462.

A total and entire failure of consideration, is an answer to any action upon a contract not mentioned in the statute, and may be shown under the general issue. 11 *Johns. Rep.*, 50. But a partial failure cannot be given in evidence without a special plea. 12 *Wend. Rep.*, 246.

In debt on simple contract or legal liabilities under the general issue, "*he owes nothing*," any matter may be given in evidence which shows that nothing was due at the time, as payment, performance, release, or other matter in discharge of the action. 1 *Chit. Pl.*, 516. But tender of the debt, set-off, a former suit and recovery, the statute of limitations, must be specially pleaded. 1 *Chit. Pl.*, 517.

In debt on bond or other specialty under the general issue, "'*Tis not his deed*," the defendant may give in evidence that the deed was delivered to a third person as *an escrow*, that is, to be his deed on the performance of a future condition, and then to be delivered, &c.; or that it was void at common law; or that it was obtained by fraud, or made by a married woman, or a person intoxicated; or that it became void after it was made, and before the commencement of the action, by erasure, alteration, addition, &c. But matter which shows that the deed was merely voidable on account of infancy or duress, or that it was void by statute in respect of usury, gaming, &c., must in general be pleaded. 1 *Chit. Pl.*, 519.

The defendant must also plead specially payment of a bond, &c., either on or after the day. So also performance or any matter in excuse of it, as *he is not injured*, to a bond of indemnity; *no award* to an arbitration bond, and matters in discharge

of the action, as a tender, set-off, accord and satisfaction, former recovery, and release, must be pleaded in this action. 1 *Chit. Pl.*, 520.

At common law, a contract under seal was binding between the parties, although no consideration, in fact, existed; nor could a defendant show a failure of consideration or a fraudulent one. He could only avoid the deed by showing that fraud was used in obtaining the making or execution of it.

By the statute, however, a total or partial failure of consideration, may be pleaded in bar to a recovery on a sealed instrument. *Gale's Stat.*, 526, § 5. The seal, therefore, is only presumptive evidence of a sufficient consideration, which may be rebutted in the same manner and to the same extent as if the instrument in writing were not sealed.

In a debt on a record, as the general issue *no such record* merely puts in the issue the existence of the record as stated, any matter in discharge of the action must be pleaded: such as a release, or that the debt was levied by execution. Accord and satisfaction is not a sufficient plea in such action. 1 *Chit. Pl.*, 521.

But in an action on a judgment before a justice of the peace, the general issue is *he owes nothing*, and the same defence may be made as in an action on a bond or other specialty. Such a judgment is not a record within the meaning of the term as here used.

In debt on statute, *he owes nothing* is the proper plea, though *not guilty* would, in some cases, suffice. The statute of limitations may, in such actions, when brought by a common informer, be given in evidence under this plea, but a former recovery by another person cannot, but must be specially pleaded. 1 *Chit. Pl.*, 522.

In *trover* the general issue is *not guilty*, and it is not usual in this action to plead any other plea, except the statute of limitations and a release. The defendant is at liberty to plead specially any thing which admits the property in the plaintiff, and the conversion but justifies the latter. The statute of limitations must be specially pleaded, and it seems to be judicious to plead specially a former recovery or verdict in a prior action. 1 *Chit. Pl.*, 536.

Under the plea of *not guilty*, the defendant may not only put the plaintiff upon proof of the whole charge contained in his declaration, but may give in evidence any justification or excuse, or any matters which operate in discharge of the cause of action. 1 *Chit. Pl.*, 528, 536.

In this action, the defendant may, under the general issue, give in evidence property in a third person. 13 *Johns. Rep.*, 276. 15 *Johns. Rep.*, 207. But in such case the defendant must show that he derived some claim, title, or interest in himself from such person. 11 *Wend. Rep.*, 54.

In *trespass to personal property*, the defendant, under the

general issue *not guilty*, cannot give anything in evidence but what directly controverts the truth of any allegation which the plaintiff on such issue will be bound to prove in support of his case. 1 *Chit. Pl.*, 538. But when the act would *prima facie* appear to be a trespass, any matter of justification or excuse, or done by virtue of any warrant or authority, must, in general, be specially pleaded. 11 *Johns. Rep.*, 132. Evidence of justification is inadmissible under the plea of the general issue in an action of trespass on personal property. 10 *Wend. Rep.*, 110. 6 *Cowen Rep.*, 691. 1 *Wend. Rep.*, 466. Even where the defendant did the act at the request of the plaintiff, or where the injury was occasioned by the plaintiff's own default, these matters of defence must be specially pleaded; so must any matter in discharge of the action, as release, former recovery, and the statute of limitations. 1 *Chit. Pl.*, 539.

5. OF SET-OFF.

At common law, and independently of the statute of set-off, the defendant is in general entitled to retain or claim by way of deduction all just allowances or demands accruing to him, or payments made by him in respect to the same transaction, or account, which form the ground of action. But this cannot be termed a set-off in the strict legal sense of the word, because it is not in the nature of a cross demand, but rather constitutes a deduction, rendering the sum to be recoverd by the plaintiff so much the less. So where demands originally cross, and not arising out of the same transaction, have, by subsequent express agreement, been stipulated to be deducted or set-off against each other, the balance only is the debt and sum recoverable without any special plea or bringing forward of set-off, though it is advisable in most cases, and necessary when the action is on a specialty, to plead it. 1 *Chit. Pl.*, 600.

In an action for work and labor, or goods sold, though the contract was at a certain price, the defendant may, *at least after a notice*, prove under the general issue, in reduction of the claim, that the work was improperly done, or that the goods were not so good as warranted. 1 *Chit. Pl.*, 600. 8 *Wend. Rep.*, 109.

And when, in an action for the price of seed sold, and which was warranted to be good new growing seed, it appeared that soon after the sale the buyer was told that it did not correspond with the warranty, but afterwards sowed part and sold the residue, it was held to be an answer to the action on the general issue, that the seed was *wholly unproductive and worthless*. 1 *Chit. Pl.*, 600.

Where the plaintiff brought an action of assumpsit to recover the amount of freight agreed to be paid by the defendants for the transportation of their goods from Buffalo to Chicago, and the defendants pleaded the general issue, and gave notice of

their intention in evidence under that plea that a portion of the goods agreed to be transported, exceeding in value the whole amount of freight claimed, was, through the negligence, carelessness, and improper conduct of the plaintiff, lost and destroyed on the voyage, and on the trial offered to introduce such evidence, first, by way of set-off, and secondly, by way of reducing the damages claimed: held that the evidence was admissible as well as a set-off as in reduction of damages. 1 *Scam. Rep.*, 462. 2 *Scam. Rep.*, 444.

Gale's Stat., 406. "SEC. 16. In all suits which shall be commenced before a justice of the peace, each party shall bring forward all his or her demands against the other, which are of such a nature as to be consolidated, and which do not exceed one hundred dollars when consolidated into one action or defence; and on refusing or neglecting to do the same, shall forever be debarred from the privilege of suing for any such debt or demand."

"SEC. 15. No defendant shall be permitted to introduce at the trial as a set-off, any note, bond, debt, or claim against the plainttff, which such defendant shall have purchased after the commencement of the suit."

The statute requiring the parties to produce on the trial before a justice of the peace all their claims not exceeding the jurisdiction of the justice, precludes the plaintiff from exhibiting other and different claims in the circuit court, on appeal, than those produced and relied on before the justice. 2 *Scam. Rep.*, 78. The circuit court, however, may, for good cause shown, permit it to be done on the appeal. 4 *Scam. Rep.*, 543.

Debts to be set-off must be between the parties to the record.

A debt due individually by one partner cannot be set-off in an action to recover a debt due the co-partner. *Breese Rep.*, 107.

The demand must have existed, that is, have been due at the time of the commencement of the suit, and must have then belonged to the defendant. 3 *Johns. Cases*, 145.

A separate debt to one of the defendants cannot be set-off against a joint debt due from all the defendants; nor can a debt due to the defendant and another or others jointly, be set-off against a debt due from the defendant alone; 10 *Johns. Rep.*, 250. 11 *Johns. Rep.*, 70; unless there was an agreement between the parties in relation to their dealings, that such debt might be set-off against each other. 2 *Taunt. Rep.*, 170.

A note payable in mason work, is not assignable so as to enable the assignee to plead it as a set-off to an action against him, or to enable him to institute a suit thereon in his own name. 1 *Scam. Rep.*, 291.

Demands arising from causes purely *ex delicto*, or wrongs committed, cannot be set-off if objected to. 1 *Scam. Rep.*, 466. 3 *Caine's Rep.*, 152. 3 *Johns. Rep.*, 433.

It is necessary that the defendant in a suit brought against him, should interpose all matters of defence which he has a right to show, whether it goes to the whole cause of action, or only to diminish the amount of the recovery, and it cannot afterwards be made the subject of a separate suit, whether it be litigated or not. 1 *Johns. Cas.*, 492. 4 *Wend. Rep.*, 483.

As when I give a note but have matter of defence against it, being able to show it void, or that it is paid, &c., and that note was sold after it became due, or under other circumstances which will let in my defence against the holder of it, I am not warranted in lying by and suffering the holder to recover against me, and then bring my action against the payee to recover the damages for the transfer, but I must set up my matter of defence, whatever it is, in the first suit, and my neglect to do so will create a final bar against me. 12 *Johns. Rep.*, 374. 13 *Johns. Rep.*, 187. 15 *Johns. Rep.*, 230, *and note a.*

So where I bring an action for work done, the defendant must show in this first action that the work was not done in a proper manner, if this be the case, and thereby diminish the amount of my recovery; and if he neglect to do this, he cannot sustain his future action for the injury sustained by the neglect. 14 *Johns. Rep.*, 377.

6. OF REPLICATIONS.

Where the defendant pleads the general issue, or any other plea which properly concludes to the country, there are no further pleadings between the parties, and there is an issue joined in the cause on which they may proceed to trial. But if the plea present some new fact, and do not merely deny the facts set forth in the declaration, the plaintiff should answer the plea by replication. 1 *Dunl. Pr.*, 485.

Thus, if usury or any other illegality in the consideration or contract be pleaded, the plaintiff may reply that there was no such usurious or illegal contract, nor usurious or illegal consideration as is set forth in the defendant's plea. This forms an issue that may be tried. 1 *Chit. Pl.*, 612.

If infancy be pleaded in assumpsit, the plaintiff may, if the plea be untrue, reply either that the defendant was of age, which would be a denial of the plea, or if the plea be true, he may reply that the goods, &c., were necessaries, or that the defendant after he became of age ratified and confirmed the promise, which would be setting up new matter in answer to the plea, and in such case the defendant must answer the replication by a rejoinder, which is usually a denial of the facts set forth in the replication.

Beyond this, the pleadings in any court seldom extend. Although a formal issue may not be required in a justice's court, yet as the remedy is by appeal, it is desirable, if not necessary, that an issue in some form should be joined, otherwise

it may be impossible for the court to determine what is to be tried.

7. OF DEMURRER.

When the declaration, plea, or replication, &c., is defective, the opposite party may demur, that is, insist that the pleading is not sufficient to sustain or bar the action. Demurrers are either general or special. General, when no particular cause is alleged; special, when the particular imperfection is pointed out and insisted upon as the ground of demurrer. The former will suffice when the pleading is defective in substance, and the latter is requisite when the objection is only to the form of the pleading. 1 *Chit. Pl.*, 701.

As pleadings in justices' courts are usually put in orally, it is apprehended that the party demurring will usually point out the defect in the pleading of which he complains, so that demurrers will usually be special.

If the opposite party be satisfied that the pleading demurred to is defective, he should apply for leave to amend, which should be granted of course.

If, however, he thinks the pleadings sufficient, he should join in demurrer, by insisting that the pleading demurred to is sufficient to sustain or bar the action.

This would form an *issue in law*, which is to be decided by the justice alone, without a jury, and upon the facts alleged by the party in the pleadings demurred to; for a demurrer admits the facts alleged in the pleadings to be true, but insists that they are not sufficient in law to sustain or bar the action. 1 *Chit. Pl.*, 700.

If the justice should decide in favor of the party demurring, he should permit the opposite party to amend the pleadings demurred to of course; and on the other hand, if he should decide against the party demurring, he should permit him to withdraw the demurrer and answer the pleadings demurred to. 2 *Saund.*, 74. 2 *Caine's Rep.*, 233, 369.

If, however, no application be made to amend or answer the pleading, the judgment will be final if in favor of the defendant, for his costs. If the demurrer be to a declaration, or other pleading of the plaintiff; or by the plaintiff to a pleading of the defendant, and is decided in the plaintiff's favor, the justice must proceed and ascertain the amount of the demand, and render judgment therefor. 1 *Scam. Rep.*, 447. 2 *Scam. Rep.*, 253.

Upon overruling a demurrer to a declaration, if the defendant pleads, he thereby waives his demurrer. 1 *Scam. Rep.*, 310.

8. OF PLEAS PUIS DARREIN CONTINUANCE.

When matter of difference has arisen after the commence-

ment of the suit, it cannot be pleaded in bar of the action generally, but must, when it has arisen before plea or continuance, be pleaded as to the further maintainance of the suit; and when it has arisen after plea pleaded and before replication, or after issue joined in fact or law, it must be pleaded *puis darrein continuance*. 1 *Chit. Pl.*, 696. 20 *Johns. Rep.*, 414. 7 *Johns. Rep.*, 194.

This plea is so called because the subject matter must be pleaded as arising *since the last continuance* of the cause.

Pleas of this kind are either in abatement or in bar. Thus it may be pleaded in abatement that a feme plaintiff has married, or in an action by an administrator that the plaintiff's letters of administration have been revoked since the last continuance. 1 *Chit. Pl.*, 697. 1 *Saund.*, 265, *note* 2.

This plea may be pleaded in bar by the defendant when the plaintiff has given him a release, or when there has been an award made on a reference after issue joined. 1 *Chit. Pl.*, 696.

Accord and satisfaction may be pleaded *puis darrein continuance*. 5 *Johns. Rep.*, 386. 2 *Scam. Rep.*, 278.

As a general rule, the plea *puis darrein continuance* is a waiver of the former pleading, and the case then stands in the same state as if this had been the plea originally put in. 1 *Chit. Pl.*, 697.

However, on a plea in abatement pleaded *puis darrein continuance*, judgment for the plaintiff, either upon demurrer or verdict, is final that the plaintiff recover, and not that the defendant answer over or plead again. 14 *Wend. Rep.*, 161.

Such pleas will, perhaps, seldom occur in proceeding before justices of the peace; but when required, there is no good reason why they should not be pleaded in justices' courts as well as in other courts.

9. OF PLEADING TITLE.

Gale's Stat., 679. "SEC. 2. That the penalties herein above provided shall be recoverable, with costs of suit, either by action of debt, in the name, and for the use of the owner or owners of the land, or by action *qui tam*, in the name of any person who will first sue for and recover the same; the one half for the use of the person so suing, and the other half for the use of the owner or owners of the land; *Provided, always*, that if in any action that may be instituted by virtue of the provisions herein contained, before a justice of the peace, the defendant shall set up a title to the land on which the tree or trees are alleged to have been cut, felled, boxed, bored, or destroyed, and shall forthwith give good and sufficient security to prosecute his claim or title to the said land to effect, within one year, or to appear and defend an action to be instituted against him within one year, by virtue of the provisions herein contained, in any court of record within the state

having cognizance thereof, and in either case to abide by and satisfy the judgment that may be given in such court; then the said justice shall proceed no further in the said cause, but shall forthwith dismiss the parties; and it shall be the duty of the said justice thereupon to tax the bill of costs that may have accrued before him; and so soon as the action shall be renewed or instituted for the purpose aforesaid, to transmit the said bill, together with the recognizance to be taken as aforesaid, to the clerk of the court in which such action shall be instituted or renewed; which costs so taxed and transmitted, shall be made a part of the judgment to be rendered as aforesaid.

"SEC. 3. That if the said recognizance shall be forfeited for not prosecuting, as aforesaid, the justice shall proceed to enter judgment against the defendant for the demand of the plaintiff, which shall be taken to be confessed, and execution shall thereupon issue against the said defendant and his security or securities; and if the said recognizance shall be forfeited for not appearing and defending, or not abiding by and satisfying the judgment that shall be given in the court above, the party for whose benefit such recognizance was taken, may, by a writ or writs of *scire facias*, proceed to judgment and execution thereon."

CHAPTER V.

OF CONTINUANCE.

WHICH is the continuing of a cause in court by an entry upon the record there for that purpose. *Jac. Law Dic.*, (*Continuance.*)

The giving of day is called a continuance, because thereby the proceedings are continued without interruption from one adjournment to another.

Gale's Stat., 405. "SEC. 8. Previous to the commencement of any trial before a justice of the peace, either party may move to have such trial put off for a time not exceeding ten days, upon making proof, either upon his own oath, or that of a credible witness, that the said party cannot safely proceed to trial, on account of the absence of a material witness, or on account of any other cause or disability, which would prevent him from obtaining justice at such trial; and if the

justice be satisfied that the party so applying, cannot safely proceed to trial; and also that the party so applying has used due diligence to be ready at the time of trial first appointed, and that his not being ready, is not the effect of such party's own neglect or inattention; then the said justice shall order the trial of said cause to be deferred to another day and hour, within ten days, to be by him appointed; and the party praying such continuance, shall pay all the costs occasioned thereby: *Provided*, The justice may, at any time, continue any case without oath, if the parties consent, or if but one party be present and shall consent, or if he shall deem it essential to justice so to do, for any good cause shown."

On the return of a summons or warrant served, if the plaintiff or his agent does not appear, the justice may continue the suit to another day, if the defendant shall consent to its being continued; when the same proceeding shall take place as though it were the return day of the process. *Gale's Stat.*, 404, *sec.* 6.

When a suit is commenced by attachment, and the return does not show that the defendant has been personally served, and the defendant shall not cause his appearance to be entered, the justice shall continue the cause ten days, for the purpose of causing notices, directed to the defendant, stating the fact that an attachment had been issued, and at whose instance, the amount claimed to be due, and the time and place of trial; and also stating that, unless the said defendant shall appear at the time and place fixed for trial, that judgment will be entered by default, and the property attached ordered to be sold to satisfy the same, to be posted up in three public places in the neighborhood of the justice, at least eight days before the day set for trial. If the constable shall have failed to post the notices as required, the justice shall again continue the cause, and require notice to be posted as aforesaid, previous to any trial of the cause. *Gale's Stat.*, 76.

When either party may have no witness, or other legal testimony, to establish his claim, and shall make oath that he has a demand, discount, or set-off in the cause, and that he knows of no witness by whom he can prove the same except by his own oath or that of the adverse party, and the adverse party be not present, the justice may continue the cause for such time as may be necessary to notify him. *Gale's Stat.*, 420.

A justice of the peace before whom any suit may be pending, may adjourn the trial not more than six days for the purpose of taking the deposition of any witness in the county where the suit is pending who shall be unable to attend on account of age, sickness, or other cause. *Gale's Stat.*, 405.

And it is presumed that a suit pending before a justice of the peace may be continued on the application of either party, for the purpose of procuring the deposition of a witness resid-

ing out of the county in which such suit shall be pending, whose testimony shall be material, in the same manner that a continuance may be had to procure the attendance of a witness.

In all cases before justices of the peace, either party may have the cause continued any reasonable time not exceeding one month, for the purpose of taking the deposition of any non-resident witness. *Gale's Stat.*, 421.

Where a jury is demanded by either party, the justice may continue the cause to any time not exceeding three days, if necessary, for summoning the jury and for the return of the venire. *Gale's Stat.*, 407.

If these continuances are omitted, the cause is thereby discontinued and the defendant is discharged *sine die*, without a day, for this turn; for, by his appearance in court, he has obeyed the command of the writ; and, unless he be adjourned over to a day certain, he is no longer bound to attend upon that summons; but he must be warned afresh, and the whole must begin *de novo*. 3 *Bl. Com.*, 316.

Every suit ought to be properly continued from its commencement to its conclusion, and the suffering any defect or gap herein is called a discontinuance. The continuance of the suit by giving the party an illegal day is properly a miscontinuance. The continuances must all be entered, otherwise there will be a discontinuance and the proceedings will be erroneous. *Jac. Law Dic.*, (*Discontinuance of process.*)

An improper and illegal continuance of a cause amounts to a miscontinuance; 4 *Johns. Rep.*, 117; and if the plaintiff proceeds after such illegal continuance and takes judgment, it may be reversed on error. *Jac. Law Dic.*, (*Discontinuance of process.*)

Yet it has been held, if the justice should proceed and render judgment, it would be valid until reversed on appeal or *certiorari*, and the justice would not be liable as a trespasser. 7 *Wend. Rep.*, 200.

The party upon whose application an erroneous continuance is made, cannot object to it. *Jac. Law Dic.*, (*Discontinuance.*) 3 *Caine's Rep.*, 166.

If the party having a right to object to the erroneous continuance, appear and go to trial, it will be a waiver of the irregularity. 9 *Johns. Rep.*, 136. 4 *Scam. Rep.*, 88.

CHAPTER VI.

OF COMPELLING THE ATTENDANCE OF WITNESSES AND OF TAKING DEPOSITIONS.

1. *Of compelling the attendance of witnesses.*

Gale's Stat., 406. "SEC. 17. When either party shall require the attendance of a witness, in any suit pending before a justice, it shall be the duty of the justice to issue a subpœna, which subpœna may be served by a constable, or any other person, by reading the same to the witness, but no mileage shall be allowed to the person serving the same."

Gale's Stat., 423. "SEC. 6. In all cases where a justice of the peace is required to issue a subpœna at the instance of either party to a suit, it shall be his duty to insert the names of four witnesses in each subpœna, if the party demanding the same shall require the attendance of that number; and in no case shall a justice of the peace be permitted to charge and receive pay for any subpœna commanding the citation of a less number, where as many as four shall be required by the same party, at the same time, to be used in the same suit."

Gale's Stat., 407. "SEC. 22. In all cases where a witness shall be duly served with a subpœna, and shall fail to attend at the trial, conformably thereto, the justice shall have power to issue an attachment, directed to any constable of the county, commanding him forthwith to bring before such justice the body of such witness so failing to attend as aforesaid, to show cause why he should not be fined for such contempt; and on the appearance of such witness on such attachment, it shall be lawful for the justice of the peace to fine him in any sum not less than one dollar, nor more than ten dollars, or wholly discharge him, if satisfactory excuse be made."

It would be proper that the justice, before issuing an attachment against a witness, should be satisfied of the due service of the subpœna. If the service is made by a constable, his return would be evidence of that fact; but if the service is made by any other person, the justice should satisfy himself of that fact by administering an oath and receiving proof.

The subpœna ought to be served on the witness a reasonable time before the trial, so as to give him time to at-

tend; otherwise an attachment ought not to be granted. 1 *Str. Rep.*, 509.

2. *Of taking depositions.*

Deposition is the testimony of a witness, otherwise called a deponent, put down in writing by way of answers to interrogatories exhibited for that purpose. *Jac. Law Dic.*, (*tit. Deposition.*)

Gale's Stat., 405. "SEC. 13. If any witness, residing within the county wherein a suit shall be pending before a justice, shall be unable to attend on account of age, sickness, or other cause, it shall be lawful for the justice before whom such suit shall be pending, or some other justice of the county, to take the deposition of such witness in writing."

The deposition taken under this section, it is presumed, is taken only conditionally to be used on the trial, provided the witness himself cannot be produced; and the party offering it should prove to the satisfaction of the justice that the attendance of the witness could not be procured, otherwise it would not appear that the deposition is the best evidence, as the public examination of a witness *viva voce* in open court in the presence of the parties, witnesses, and jurors, is much the most conducive to the ascertaining of truth. 1 *Stark. Ev.*, 264.

As the jurisdiction of a justice of the peace is confined to the limits of the county for which he was elected, he has no power to compel the attendance of witnesses unless they may be found in such county. This inconvenience, however, is remedied by sec. 14 of the same statute, which provides that, "If any witness, whose testimony shall be material in a suit pending before a justice, shall reside out of the county wherein such suit shall be pending, the party desiring it, may take his, her, or their deposition or depositions, before any justice of the peace in the county in which such witness or witnesses reside; and the depositions taken in conformity thereto may be given in evidence in said suit, if it shall be made to appear that the opposite party had reasonable notice of the time and place of taking such depositions."

Gale's Stat., 421. "SEC. 9. In all cases, before justices of the peace, either party may have the case continued any reasonable time, not exceeding one month, for the purpose of taking the deposition of any non-resident witness; which deposition shall be taken in conformity to the manner of taking and returning depositions of non-resident witnesses in the circuit courts in this state."

This statute has not in terms authorized a justice to issue a commission to any person as commissioner, or to any judge or justice, to take the testimony of witnesses. It however

requires that the "deposition shall be *taken* in conformity to the manner of taking and returning depositions of non-resident witnesses in the circuit court of this state."

By the 1st sec. of "An act regulating the mode of taking depositions," *Gale's Stat.*, 244, it is provided "That when the testimony of any non-resident witness or witnesses shall be necessary in any civil cause depending in any court of law or equity in this state, it shall be lawful for the party wishing to use the same, on giving to the adverse party or his attorney ten days' previous notice, together with a copy of the interrogatories intended to be put to such witness or witnesses, to sue out from the proper clerk's office a *dedimus potestatem*, or commission under the seal of the court, directed to any number of persons, not exceeding three, as commissioners, or to any judge or justice of the peace of the county or city in which such witness or witnesses may reside, authorizing and requiring him or them to cause such witness or witnesses to come before him or them at such time or place as he or they may designate and appoint, and faithfully to take his, her, or their deposition or depositions upon all such interrogatories as may be inclosed with, or attached to said commission, both on the part of the plaintiff and defendant, and none others; and to certify the same when thus taken, together with the said commission and interrogatories into the court in which such cause shall be depending, with the least possible delay."

By a necessary implication, it seems that a justice of the peace before whom a cause is depending, is empowered to issue a commission, upon the application of either party, for the purpose of taking the testimony of a non-resident witness.

It would certainly be proper, if not necessary, that the party desiring to sue out a commission, should notify the opposite party of his intention, and of the time when he will make the application. On appearing before the justice pursuant to his notice, the party applying should make proof, either by his own oath or that of a credible witness, that the absent witness whose testimony is desired, does not reside in this state, and that his testimony is material to the prosection (or defence) of the action, as the case may be, and without which he cannot safely proceed to trial. If the justice be satisfied that the party so applying cannot safely proceed to trial without such testimony, he should allow the commission and order a continuance for its execution and return to any reasonable time not exceeding one month. In case the party asking for the commission states the facts which he expects to prove by the absent witness, which facts are admitted by the opposite party, there would be no necessity for issuing the commission, and the justice should refuse it.

The time and manner of submitting interrogatories and cross-interrogatories, is not regulated by the statute.

The party desiring to obtain the testimony of the absent witness, should perhaps present his interrogatories at the time of applying for a commission, so that the opposite party may have an opportunity of inspecting them and submitting cross-interrogatories. This would appear to be the most convenient course to pursue.

The opposite party should undoubtedly be apprised in some way of the interrogatories; for the depositions of a witness, although made under the sanction of an oath, are, in general, not evidence as to the facts which they contain, unless the party to be affected by them has cross-examined the deponent, or has been legally called upon and had the opportunity to do so; for, otherwise, one of the great and ordinary tests of truth would be wanting. 1 *Starkie Ev.*, 264.

The form of the interrogatories ought, of course, to embrace the subject of inquiry, and, in doing so, should be governed by the rules applicable to oral examinations. The parties are, however, authorized to insert a general interrogatory, whether the witness knows of any other matter or thing material to the party beside what he has been particularly interrogated unto; under which the witness may state facts not previously called for under the particular interrogatories. 18 *Johns. Rep.*, 257. And, if this interrogatory be not answered, the deposition cannot be read, it being an undoubted principle, that the witness must answer substantially all interrogatories, as it is otherwise impossible to say that he has told the whole truth. 4 *Wash. C. C. Rep.*, 324. It is not an objection to a deposition that a material part of the evidence comes out under the general interrogatory. 4 *Wash. C. C. Rep.*, 716.

The interrogatories and cross-interrogatories should be inclosed with or annexed to the commission, which is a *writ*, giving authority to the person or persons to whom it is directed to examine the witness named therein, and to certify the same to the justice who issued it, which *writ* is sued out by the party desiring the testimony of the witness, and to whom it belongs to transmit it to the commissioners, judge, or justice to whom it is directed, and to do whatever else is requisite to obtain an examination of the witness and return of the commission.

Gale's Stat., 245. "SEC. 3. Previous to the examination of any witness whose deposition is about to be taken as aforesaid, he or she shall be sworn (or affirmed) by the person or persons authorized to take the same, to testify the truth in relation to the matter in controversy, so far as he or she may be interrogated; whereupon, the said commissioner or commissioners, judge, justice of the peace or clerk, (as the case may be,) shall proceed to examine such witness upon all such interrogatories as may be inclosed with, or attached to

any such commission as aforesaid, and which are directed to be put to such witness.—After which it shall be the duty of the person or persons taking such deposition, to annex at the foot thereof, a certificate subscribed by himself, or themselves, stating that it was sworn to and signed by the deponent; and the time and place, when and where the same was taken. And every such deposition, when thus taken and subscribed, and all exhibits produced to the said commissioner or commissioners, judge, justice of the peace, or clerk as aforesaid, or which shall be proved or referred to by any witness, together with the commission and interrogatories, if any, shall be inclosed, sealed up, and directed to the clerk of the court in which the action shall be pending, with the names of the parties litigant endorsed thereon: *Provided*, that when any deposition shall be taken as aforesaid, by any judge or justice of the peace out of this state, such return shall be accompanied by a certificate of his official character under the great seal of the state, or under the seal of the proper court of record of the county or city wherein such deposition shall be taken."

The statute authorizing the taking of depositions of non-resident witnesses to be used in justices' courts, does not seem to provide the manner of certifying and returning the same. Undoubtedly, however, it should appear from the certificate that the requirements of the statute have been complied with in the taking of the deposition.

The manner of executing the commission ought not to be left to inference, but should be plainly and explicitly stated. In the return, the commissioners, judge, or justice to whom the commission is directed, ought to certify the time and place when and where the depositions were taken, and that the witness was examined by them or him upon oath upon all the interrogatories inclosed with or attached to the commission, and that the deposition was sworn to and subscribed by the witness.

After the depositions have been taken and certified, they should be inclosed and sealed up by the commissioners, judge, or justice, together with the commission and interrogatories, and directed to the justice of the peace who issued the commission.

CHAPTER VII.

OF THE TRIAL OF ISSUE OF FACT AND THE INCIDENTS THERETO.

TRIAL is the examination of a cause before a judge who has jurisdiction of it, according to the laws of the land. It is the examination of the points in issue and of the questions between the parties whereupon judgment may be given. *Jac. Law Dic.*, (*tit. Trial.*) 3 *Bl. Com.*, 330. And it is also taken for the manner and order of proceeding in the hearing and determining of matters in difference, being diversely used, according to the nature of the cause to be tried. *Ibid.*

I. Of removing the trial from one justice to another.
II. Of trials in the absence of the defendant.
III. Of trials before a justice without a jury.
IV. Of trial by jury.
  1. Of the venire, the service, and return thereof.
  2. Of attachments against defaulting jurors.
  3. Of challenges.
  4. Of swearing the jury.
  5. Of proceedings on trial.
  6. Of the deliberations of the jury, receiving and entering their verdict, and discharging them.
V. Of referring the cause to arbitrators.

I. OF REMOVING THE TRIAL FROM ONE JUSTICE TO ANOTHER.

Gale's Stat., 408. "SEC. 25. Previous to the commencement of any trial before a justice of the peace, the defendant, or his or her agent, may make oath that it is the belief of such deponent that the defendant cannot have an impartial trial before such justice; whereupon, it shall be the duty of the justice immediately to transmit all the papers and documents belonging to the suit, to the nearest justice of the peace, who shall proceed as if the said suit had been instituted before him."

II. TRIAL IN THE ABSENCE OF THE DEFENDANT.

Gale's Stat., 404. "SEC. 5. If the defendant shall not appear at the time of trial, after giving bail as aforesaid, or after being served with a summons, as described in the third section of this act, and no sufficient reason be assigned to the justice, why he or she does not appear, then the justice shall proceed to hear and determine the cause, in the absence of said de-

fendant, but shall not give judgment in favor of the plaintiff, unless the said plaintiff shall fully prove his demand in the same manner as if the defendant had been present and denied the same."

The omission of the defendant to appear and plead is not considered as an admission of the plaintiff's demand, but he must establish it by testimony in the same manner as though an issue had been joined. The justice is bound to hear the merits in all cases before judgment against the defendant. Strictly speaking, there is no such a thing before a justice of the peace as a judgment by default, but always a trial, or a hearing in the nature of a trial. 8 *Cowen's Rep.*, 133.

When a suit is commenced by attachment, which shall have been returned personally served on the defendant; or in case it shall not have been personally served and the suit shall have been continued ten days, and notices have been posted up as required by the 3d sec. of "An act to regulate proceedings by attachment before a justice of the peace," and the defendant shall not then appear, the justice shall, on the return of the attachment, personally served, or on the day to which the suit shall be continued, if it shall not have been personally served, proceed to hear and determine the cause as in cases of proceeding by summons.

III. OF TRIAL BY WITNESSES BEFORE THE JUSTICE WITHOUT A JURY.

This is a method of trial which was but rarely used in courts proceeding according to the course of the common law.

Gale's Stat., 405. "SEC. 9. When the parties shall appear and be ready for trial, the justice shall proceed to hear and examine their respective allegations and proof, and shall thereon give judgment against the party who shall be proved to be indebted to the other, for so much money in dollars and cents as shall appear to be due, with costs of suit; but if neither party shall appear to be indebted to the other, then the judgment shall be against the plaintiff for the costs of suit only; and if such judgment be rendered upon any note or bond, or for the balance due upon a settled account, the justice shall allow interest from the time when the same became due, and include the same in the said judgment; and in all cases the judgment shall bear interest at the rate of six per cent. per annum until paid."

If neither party calls a jury, the justice must try the cause himself. He must hear and examine the proofs and allegations of the parties, and he is then left to form, in his own mind, his judgment upon the credit of the witnesses examined and the evidence adduced, according to the rules of law and as the justice of the case may appear.

In doing this, the justice ought ever to keep in mind that he is

acting in a twofold capacity: as a judge, directing and controlling the proceedings according to the established rules of law; and as a juror, trying the facts. 2 *Cowen's Treatise*, 877.

Among the duties required of an individual, in conducting and sustaining the civil institutions of the country, there is none, perhaps, which more requires that, when acting in a judicial capacity, he shall divest himself of all feeling and prejudice, of all favor and partiality. And that magistrate who can maintain a cautious and circumspect demeanor while presiding to investigate and determine the causes which may be litigated before him, and who shall not suffer his judgment to be biased by any hopes of reward, or to be swayed by any threatened displeasure, or the fear of the power of another, is worthy of the confidence reposed in him, and deserving of support.

A justice is not like a juror, liable to be challenged for favor, partiality, or even corruption, though he would be subject to indictment for the latter. 12 *Johns. Rep.*, 350.

It is sometimes the case that a person who has a matter in dispute with another, will go to a justice and relate the same to him particularly and circumstantially, and obtain his views upon the equity and legality of the claim, and, if they are favorable, will bring suit. In every such instance a justice should refuse to issue process; for, as has been said by a philosopher, "he that shall judge and determine of a matter, the one party being unheard, although he shall give just judgment, yet he is not a just judge."

If in such a case, through the artful practices of the plaintiff, the justice should inadvertently issue process, on coming to the knowledge thereof, it would undoubtedly be proper that he should suspend all further proceedings.

It would be a gross indecency for a justice to try a cause for a near relation. 13 *Johns. Rep.*, 191.

A justice of the peace must not decide on his own previous knowledge of facts, but only on evidence adduced before him. He must decide upon evidence produced in court. 2 *Johns. Rep.*, 189.

He shall hear and examine the respective allegations and proofs of the parties, and shall thereon give judgment.

If the plaintiff is satisfied that his proof is insufficient to sustain his action, he may, at any time before the cause is submitted to the justice, submit to a nonsuit.

If the party intend to submit to a nonsuit, however, he must do so before the cause is finally submitted for advisement, or the judgment will be a bar to a new action; 11 *Johns. Rep.*, 457; and this although the justice call his judgment a judgment of nonsuit and enter it accordingly. 10 *Wend. Rep.*, 519.

IV. OF TRIAL BY JURY, AND WHEN TO BE DEMANDED.

Where there is a matter in controversy between the parties exceeding twenty dollars, either party may demand to have the cause tried by a jury before any evidence shall have been offered in support or defence of the same. A jury signifies a certain number of men sworn to enquire of and try the matter of fact and declare the truth upon such evidence as shall be delivered them in a cause: they are sworn judges upon evidence in matters of fact. *Jac. Law Dic.*, (*tit. Jury.*)

And, at the common law, it was the peculiar province of a jury to try the point or matter issuing out of the allegations and pleas of the plaintiff and defendant in a cause; and, until an issue was formed and the parties had put themselves upon the country, both parties thereby agreeing to rest the fate of their cause upon the truth of the fact in question, there could be no trial.

Gale's Stat., 407. "Sec. 21. At any time before judgment is given in any suit before a justice, either party may demand to have the cause tried by a jury, provided the matter in controversy exceed twenty dollars; whereupon, it shall be the duty of the justice to issue his writ, directed to any constable, commanding him to summon a jury of six men, or twelve, if a less number be objected to; and the said jury shall be empannelled as soon as may be, the justice adjourning the cause if necessary to any time, not exceeding three days, for that purpose. The jury, when empannelled, shall be sworn by the justice to try the case according to the evidence, and the justice shall enter judgment upon their verdict, according to the finding thereof."

By an amendment of this section, it is provided "That from and after the passage of this act, it shall not be lawful for any justice of the peace, without the consent of all the parties to any suit pending before him, to order a trial by jury, unless such trial shall be demanded before either of the parties shall have offered any evidence in support or defence of any such suit, nor unless the party demanding such trial by jury shall first pay the fees to which the jurors trying the same shall be entitled." *Sess. Laws of* 1838–9, *p.* 87.

Unless there is a matter in controversy between the parties, a fact affirmed by one party and denied or confessed and avoided by the other, it seems that a jury cannot be demanded. The venire prescribed by the statute commands the constable to summon lawful men, to make a jury between the parties of a plea of , because as well the said plaintiff as the said defendant have put themselves upon the country for trial.

When, however, a formal issue has not been joined, and the parties appear before the justice and jury and investigate

the cause upon its merits, the irregularity will be considered as waived, as an opportunity to have justice substantially done has been afforded to them.

If the parties appear and go to trial without a plea being put in, it is such an irregularity as will be cured after verdict by the statute of amendments. *Breese's Rep.*, 14. So where one of several pleas be not answered, and the parties go to trial without any objection on the part of the defendant, it will be considered as waived, or the irregularity will be cured by the verdict of the jury. 1 *Scam. Rep.*, 73.

1. *Of the venire, the service, and return thereof.* A venire is a judicial writ, awarded to cause a jury of the neighborhood to appear when a cause is brought to issue, to try the same. *Jac. Law Dic.*, (*tit. Venire Facias.*)

By *Gale's Stat.*, 407, *sec.* 21, the constable is required to summon the jury from the county in which the suit is pending. And the venire directs that he shall summon no person who is of kin either to the plaintiff or defendant, &c.

Gale's Stat., 407. "SEC. 23. If any juror, summoned as aforesaid, shall be interested in the event of the suit, or of kin to either party, or shall have expressed his opinion on the matter about to be tried, or shall, for any other cause, to be judged of by the justice, be considered as a partial or improper juror, in that case the justice shall discharge such juror; and when by such discharge, or the failure of any juror to attend, the jury shall not be complete, the justice shall direct the constable to summon as many persons as shall be required to complete such jury instantly, from among the bystanders, or other persons in his bailiwick, which summons shall be verbal; and the persons so summoned shall be bound to serve on such jury, and on refusal or failure to do so, may be attached and fined for contempt."

Gale's Stat., 395. "SEC. 1. That all free white male taxable inhabitants in any of the counties in this state, being natural born citizens of the United States, or naturalized according to the constitution and laws of the United States, and of this state, between the ages of twenty one and sixty years, not being judges of the supreme or circuit court, county commissioners, judges of probate, clerks of the circuit or county commissioners' court, sheriffs, coroners, postmasters, licensed attorneys, overseers of the highway, or occupiers of mills, ferries, toll-bridges, or turnpike roads, being of sound mind and discretion, and not subject to any bodily infirmity, amounting to a disability, shall be considered and deemed as competent persons, (except in cases where legal disabilities may be imposed for the commission of some criminal offence,) to serve on all grand and petit juries, in and for the bodies of their counties respectively."

The venire should not only be directed to, but should be

executed by, a constable of the county from which the jury is to be summoned, and in which the cause is pending.

The constable should execute the venire fairly and impartially, and should not summon any person whom he has reason to believe biased or prejudiced for or against either of the parties.

He should summon the jurors personally, and make a panel or list of the persons summoned, which panel he must certify and annex to the venire, and return the same to the justice. 3 *Bl. Com.*, 353. Or he may endorse the panel and certificate on the back of the venire. The manner of serving may be by reading or stating the substance of the venire to each person summoned, and particularly the name of the justice issuing the venire, the names of the parties to the suit, and the time and place of trial. The jurors should have a reasonable time to attend after notice.

The return of the officer with the panel will be at least *prima facie* evidence of the venire being duly served, on a proceeding against a juror by attachment for his non-attendance. 14 *Johns. Rep.*, 481. 3 *Bac. Ab.*, 732.

2. *Attachments against defaulting jurors.* in all cases where a person shall be summoned as a juror to try any cause before a justice of the peace, and shall fail to attend at the time and place appointed in the venire, the justice shall have power to issue an attachment directed to any constable of the county, commanding him forthwith to bring before such justice the body of such juror so failing to attend as aforesaid, to show cause why he should not be fined for such contempt; and on the appearance of such juror on such attachment, it shall be lawful for the justice of the peace to fine him in any sum not less than one dollar, nor more than ten dollars, or wholly discharge him, if satisfactory excuse be made. *Gale's Stat.*, 407.

In case of a proceeding against a juror, the return of the constable on the venire would be sufficient evidence of the summoning of the juror. 14 *Johns. Rep.*, 481. And the docket of the justice would be sufficient evidence that the juror made default in appearing.

3. *Of calling the jury.* Upon the return of the venire by the constable with the panel of the jurors annexed, the parties being ready for trial, the justice proceeds to call the names of the jurors for the purpose of ascertaining that there is a full panel, and that all are in attendance who have been summoned.

If any of the jurors shall fail to attend, the justice shall then direct the constable to summon as many persons as may be necessary to complete the panel from the bystanders, or other persons in his county, which summons shall be verbal.

4. *Of challenges.* Before the jury are sworn, if a party have any objection, either of interest or favor, or for other cause, against the constable summoning them or any of the jurors, whether originally summoned as such or called as talesmen, he must state his objection to the justice, and this is called a challenge. Challenges are of two kinds, to the array and to the polls; and each of these is again subdivided into principal challenges and challenges to the favor. 3 *Bl. Com.*, 358.

Challenges to the array are at once an exception to the whole panel in which the jury are arrayed or set in order by the constable in his return, and they may be made upon account of partiality, or some default of the constable who arrayed the panel. If the constable arrays the panel at the nomination or under the direction of either party, this is good cause of challenge to the array. 3 *Bl. Com.*, 353.

The causes of principal challenge to the array, are such as the following, viz: that the officer who makes the array is of kindred or affinity to either party within the ninth degree; that one or more of the jury are returned at the nomination of either party; that an action of battery or other action implying malice is pending at the suit of either party against the officer, or at the suit of the officer against either party; that an action of debt is pending at the suit of either party against the officer, but not if by the officer against either party; that the officer is under the distress of either party; that the officer is counsel or attorney of either party, or is an arbitrator in the same matter and has treated thereof; and for other causes. 7 *Cowen's Rep.*, 478, *and note.* 10 *Johns. Rep.*, 107.

The causes of challenge to the array for favor are such as imply at least a probability of bias and partiality in the officer but do not amount to a principal challenge. Thus, that the plaintiff or defendant is the tenant of the officer, or that the son of the officer has married the daughter of the plaintiff or defendant, or the like. 1 *Cowen's Rep.*, 436, *note* 1. 3 *Bac. Ab.*, 747.

A challenge to the polls is an exception to one or more of the jurors or talesmen who have appeared individually, and this is either a principal challenge or challenge to the favor. The causes of principal challenge may be classed under the following heads:

Challenge propter defectum. That the juror is not qualified to serve on a jury; that he is a minor, or that he is an idiot or lunatic; that he is an alien, or that he is a non-resident of the county.

But a matter which merely exempts a man from serving on a jury can never be a cause of challenge. 1 *Cowen's Rep.*, 438, *note.*

Challenge propter affectum, by reason of some supposed bias or partiality, thus: that the juror is of kin to either party

within the ninth degree; that there is an affinity or an alliance by marriage between the juror and one of the parties, if such affinity continue, or there be issue of the marriage alive, for otherwise it would be but a challenge to the favor, and so in all cases where the juror has an interest in the action direct or collateral. It is a principal cause of challenge that the juror has before given a verdict in the same cause or upon the same matter, though between other parties; that he was chosen arbitrator in the same cause by one of the parties and has entered on an examination of it, but otherwise if he was chosen indifferently by both parties; that he is a counsellor, servant, or tenant of either party; that he is of the same society or corporation of either party. (Yet it has been held to be no ground of challenge to a juror that he is a freemason where one of the parties to the suit was a freemason. 13 *Wend. Rep.*, 9.)

And in all actions brought by or against every county, the inhabitants of the county so suing or being sued may be jurors if otherwise competent and qualified according to law. *Gale's Stat.*, 159, § 6.

So it is a principal cause of challenge that he has taken information of the cause beforehand; that he has declared his opinion of the cause beforehand, *Breese's Rep.*, 29, or upon any one principal point or ingredient in the cause, *Burr's Trials*, but not when he merely expresses a conditional opinion thus, "If the reports of the neighbors be true, the defendant is wrong and the plaintiff is right;" 8 *Johns. Rep.*, 445; that, since he has been returned, he has eaten or drunk at the expense of one or more of the parties; that one of the parties has labored the juror and given him money or other things for giving his verdict; that an action implying malice or displeasure is pending between the juror and one of the parties; but if not implying malice or displeasure, it is but matter of challenge to the favor. 1 *Cowen's Rep.*, 438, *note*. 3 *Bac. Ab.*, 748. 4 *Scam. Rep.*, 88.

Challenge propter delictum. Where, for some act of the juror, he has ceased to be, in consideration of law, a good and legal man.

Thus, that he has been convicted of treason, felony, perjury, conspiracy, forgery, &c., or for any infamous crime. 1 *Cowen Rep.*, 438, *note*. 3 *Bac. Ab.*, 750.

The challenge to the polls for favor, is of the same nature with the principal challenge *propter affectum*, but of an inferior degree.

The general rule of law is, that the juror shall be indifferent, and if it appear probable that he is not so, this may be made the subject of challenge, either principal or to the favor, according to the degree of probability of his being biased. The cause of principal challenge to the polls, we have seen, is such matter as carries with it *prima facie* evident marks of sus-

picion, either of malice or favor. But when, from circumstances, it appears probable that a juror may be biased in favor of, or against, either party, and yet such circumstances do not amount to matter for a principal challenge, it may be made a challenge to the favor. The effect of these two species of challenges is the same; the only difference between them is the mode of trying them.

If a juror declare on oath to the triors, that the testimony being equal he should find a verdict for the plaintiff, he should be rejected. 7 *Cranch Rep.*, 291. Any circumstances which can be raised, showing that the juror is not wholly free from a reasonable suspicion of bias, is sufficient for the triors to set him aside, and this they should do when they are in doubt whether the juror is indifferent. These causes of challenge to the favor, very frequently happen from circumstances which in no way impeach the juror. It is no dishonor to be the intimate friend and companion of any man in good credit; nor is it any offence to resent injuries, and to differ from a man that treats you ill; nor is it any impeachment of a man that, on two of his neighbors differing, he should feel an inclination that one should prevail over the other; yet, in either of these cases, a person thus circumstanced cannot be said to stand free from suspicion of bias. The causes of favor are infinite, and with regard to all cases of challenges to the favor, the rule of law is that the juror must stand indifferent as he stands unsworn. 1 *Cowen's Rep.*, 439, *note*. 3 *Bac. Ab.*, 756.

When and how made. There can be no challenge either to the array or to the polls before a full jury appears; therefore, if a sufficient number of jurors who have been summoned on the venire, do not appear, no challenge can be made until a sufficient number have been summoned, and appeared as talesmen to complete the jury. 7 *Cowen Rep.*, 478. No juror can be challenged after he has been sworn.

If you have divers causes of challenge to the array, or to the polls, they must all be made at once, and cannot be tried separately. If one party challenge and the juror be found indifferent, the other party may then challenge. After you have taken a challenge to the polls you cannot challenge the array, but a challenge to the array may be made at any time before one of the jurors is sworn, and a challenge to the polls at any time before the juror challenged is sworn; but after he is sworn it is too late. It is immaterial which party challenge first, but the party who first begins must finish all his challenges before the other begins, otherwise he is precluded from making any other challenge. Also, the challenge of the party who first challenges shall be first tried. 1 *Cowen Rep.*, 439, *note*. 3 *Bac. Ab.*, 764.

How tried. A principal challenge, either to the array or to the polls, is tried by the justice alone without the aid of triors. If the facts alleged as the ground of challenge are denied, wit-

nesses are to be sworn and examined by the justice, who decides upon their testimony, and either quashes the array or overrules the challenge. And so if the facts alleged are admitted by the opposite party, but are deemed insufficient by the justice, he decides thereon. 3 *Bac. Ab.* 765.

If the challenge is to the array for favor, it is tried by two triors appointed by the justice, who may be two of the jurors or any two indifferent persons named by the justice; but if the facts are admitted, the justice may decide thereon. 9 *Johns. Rep.*, 261.

The challenge to the polls for favor, by the common law is thus tried: if two jurors have been already called and are not challenged, they try the challenge; but if the first juror called is challenged, the justice names two indifferent persons to try it; and if they try one man and find him indifferent, he shall be sworn, and then he and the two triors try the next; and when another is found indifferent and sworn, the two triors are superseded, and the first two sworn on the jury try all the rest. 3 *Bl. Com.*, 363.

It is, however, provided by the statute that if any juror shall be interested in the event of the suit, or of kin to either party, or shall have expressed his opinion on the matter about to be tried, *or shall, for any other cause to be adjudged by the justice, be considered as a partial or improper juror, in that case the justice shall discharge such juror. Gale's Stat.*, 407, § 23.

By this statute it appears that a challenge to the polls for favor, as well as a principal challenge, is to be tried by the justice alone, without the aid of triors.

On a challenge to a juror, either principal or to the favor, the juror may himself be examined on oath of *voir dire* with regard to such causes of challenge as are not to his dishonor or discredit; but not with regard to any crime, or any thing which tends to his disgrace or disadvantage. 3 *Bl. Com.*, 364. 19 *Johns. Rep.*, 115.

A justice may, on his own motion, challenge and set aside a juror for intoxication. 2 *Cowen Rep.*, 430. And if the intoxication be obvious, it would be his duty to set aside the juror.

Of issuing a new venire. If, on a challenge to the array, the challenge be allowed, a new venire should be issued, as otherwise the party would be deprived of the right of trial by jury.

The quashing the array of the principal panel, does not quash that of the tales, but the inquest shall be taken by those returned on the tales if there be a sufficient number, otherwise more shall be added to them by a new tales; but if all the persons returned on the venire shall appear, be challenged, and drawn, there shall not be a tales awarded, but a new venire; for the word "tales" plainly refers to some others to whom the persons returned are to be like. 3 *Bac. Ab.*, 744.

If a venire has been mislaid, kept, or withheld by the de-

fendant, who received it from the justice, or has been otherwise suppressed, a new venire should issue, or the act of the defendant might totally defeat the plaintiff's action. 2 *Caine's Rep.*, 134.

As a general rule, a justice cannot try a cause without a jury after a party has duly demanded to have the cause tried by a jury, when the matter in controversy exceeds twenty dollars.

But if a venire be improperly suppressed by the party demanding it, the justice has a right to try the cause without a jury; as, if the justice should deliver the venire to the party for the purpose of handing to the constable, which he should neglect to do, and the party should not appear at the return of the venire, the justice would have a right to consider it as a waiver of the trial by jury. And, although he might issue another venire, he would not be bound so to do. 19 *Johns. Rep.*, 384.

The party demanding a trial by jury has, undoubtedly, a right to waive such trial after a venire has been issued; but if the venire has been served and returned, the other party would have a right to insist that the cause should be tried by the jury thus returned, notwithstanding the party originally demanding such trial should waive it.

4. *Of swearing the jury.* After a full jury shall have been obtained, and not before, they are to be sworn. They may be sworn separately, or any number at a time.

The jury, when empannelled, should be sworn by the justice to try the case according to the evidence. *Gale's Stat.*, 405, § 21.

Swearing the jury is a matter of form, and an irregularity in swearing them, not objected to at the time, cannot be assigned as error. *Breese Rep.*, 12.

5. *Of proceedings on trial.* When the cause is ready for trial before the justice without a jury, or, if tried by a jury, after the jury has been sworn, it is the right of each party to state his case. The party holding the affirmative of the matter to be tried, first opens the case and first calls his witnesses. This right usually belongs to the plaintiff, but it may in certain cases belong to the defendant; as if the defendant, without pleading the general issue, should plead a failure of consideration in the contract upon which the suit is brought. The plea admits the making of the contract and the matters stated in the declaration; and it will be incumbent on the defendant in the first place to prove the failure of the consideration. He, therefore, will hold the affirmative, and will have a right to open the case, and first call and examine his witnesses.

After the party thus having the right to open the case has gone through with his testimony, the other party has then a right to open the adverse case, and call and examine his witnesses; and the party who opened the case has a right to call and examine witnesses in answer to the evidence produced by

the other party, and so alternately until the parties are through with the testimony. 3 *Bl. Com.*, 366.

But this rule is subject to some qualification. The plaintiff, or the party holding the affirmative, should adduce all his proof; then the party holding the defensive or negative side; and then the first may adduce evidence to rebut, qualify, or explain away the matter proved against him. Beyond these boundaries the justice may or may not allow the parties to go, in his discretion. This it is proper to allow, if he think any thing material has been inadvertently omitted, as is often the case. But the parties cannot, in their discretion, go back and renew their controversy on a new state of facts. And if the plaintiff have two or more distinct causes of action, and the parties go into their entire proofs in respect to one of them only, it might prove vexatious in practice, if the plaintiff were allowed to go back and take the same round in respect to each separate cause of action. Strictly, he should have gone into proof of all his claims before resting the cause, and before the defendant had begun. Yet the justice might allow it, and should do so, if satisfied that the omission to take the full ground in the first instance was inadvertent.

And so where the defendant has two or more distinct matters of defence or claims by way of set-off.

Previous to any testimony being given by any witness, he is to be sworn or affirmed.

Gale's Stat., 414. "Sec. 56. The justices of the peace within this state shall have power to administer all oaths required by law, and not particularly directed to be otherwise administered; and where any person who shall be required by law to take an oath, shall be conscientiously scrupulous against taking such oath in the usual form, such person may affirm; which affirmation shall have the force and effect of an oath."

Gale's Stat., 513. "Sec. 1. That whenever any person shall be required to take an oath before he enters upon the discharge of any office, place, or business, or on any other lawful occasion, and such person shall declare that he or she has conscientious scruples about the present mode of administering oaths by laying the hand on, and kissing the gospels, it shall be lawful for any person empowered to administer the oath, to administer it in the following form, to wit: the person swearing shall, with his or her hand uplifted, *swear by the ever living God;* and shall not be compelled to lay the hand on, or kiss the gospels. And oaths so administered, shall be equally effectual, and subject such persons to the like pains and penalties for wilful and corrupt perjury, as oaths administered in the usual form.

"Sec. 2. Whenever any person required to take or subscribe an oath as aforesaid, and in all cases where an oath is upon any lawful occasion to be administered, and such person

shall have conscientious scruples against taking an oath, he or she shall be admitted instead of taking an oath, to make his or her solemn affirmation or declaration in the following form, to wit: "*You do solemnly, sincerely, and truly declare and affirm*;" which solemn affirmation or declaration shall be equally valid, as if such person had taken an oath in the usual form: and every person guilty of falsely and corruptly declaring as aforesaid, shall incur and suffer the like pains and penalties as are, or shall be inflicted, on persons convicted of wilful and corrupt perjury."

The oaths to witnesses, jurors, &c., are to be administered by the justice before whom the trial is pending, and no other justice, or other officer, has any authority to administer them. The justice himself, if objected to, cannot thereon be sworn as a witness. 1 *Johns. Rep.*, 520. But if sworn without objection, no advantage can afterwards be taken of it. 8 *Johns. Rep.*, 470. 12 *Johns. Rep.*, 296.

When a witness has been sworn, he is first to be examined by the party who calls him, and he has in general a right to go through with his examination before the other party puts any question to him. The witness may then be cross-examined by the other party, and afterwards the party who first called him may re-examine him, and so alternately until both parties have put to him all questions that they wish to. *Phil. Ev.*, 221.

In strictness, the party calling a witness is bound to finish his questions on the examination in chief, then the defendant must do the same on cross-examination, and the witness can be re-examined only to cut down or explain matter which comes out on the cross-examination.

After the evidence is closed, the parties, by themselves or counsel, make such observations to the justice or jury as are applicable to their case. The party holding the affirmative to close the argument.

The re-calling of a witness, after his examination has been closed, is a matter of discretion in the court. 2 *Scam. Rep.*, 491.

After the evidence has been closed, and even after the cause has been summed up, the justice may, in his discretion, permit further evidence to be given. 7 *Johns. Rep.*, 306. 4 *Cowen's Rep.*, 450. 6 *Wend. Rep.*, 268.

It is discretionary with a court to hear evidence after the argument of a cause is opened by counsel. This is at all times and before all courts matter of discretion, and before justices of the peace much more ought that discretion to be indulged. *Breese Rep.*, 35.

But not, it would seem, at the request of either party after the cause has been finally submitted to the justice or jury. 2 *Johns. Cas.*, 319. 4 *Binney Rep.*, 488.

After a juror is sworn, he may not leave the court until the evidence is given for any cause whatever, without leave of

the court; and with leave he must have a keeper with him. *Jac. Law Dic.*, (*Jury.*) It would hardly seem necessary that a keeper should attend a juror in all cases of occasional absence.

6. *Of the deliberations of the jury.* When the jurors retire to deliberate upon the case, a constable ought to be sworn to keep them together and not to suffer any person to speak to them. 3 *Bac. Ab.*, 768.

They should be kept together till they bring in their verdict, without speech with any, and without meat or drink, otherwise than with leave of the court by consent of the parties. *Jac. Law Dic.*, (*tit. Jury.*)

After their departure, they may desire to hear one of the witnesses again respecting a thing of which they are in doubt, and it shall be granted, so he deliver his testimony in open court. 3 *Bac. Ab.*, 768. 7 *Johns. Rep.*, 32. It is not uncommon for witnesses to be re-examined at the request of the jury, when any disagreement arises after they have retired to consider of their verdict. 9 *Cowen's Rep.*, 65.

A witness may not be called by the jury to recite the same evidence he gave in court, when they have gone from the court to deliberate; nor may a party give a brief or notes of the case to the jury to consider of: if he doth, he and the jurors may be fined. *Jac. Law Dic.*, (*tit. Jury.*)

After the jury have retired to consider of their verdict, the justice should have no intercourse with them except with the consent, or in the presence of the parties. 1 *Cowen's Rep.*, 258.

After the jury have retired to consider of their verdict, it is not irregular for the justice, at the request of the jury, to give them instruction upon the law of the case, if the parties are present, or have an opportunity to be present. 13 *Wend. Rep.*, 274. 3 *Bac. Ab.*, 768.

If the jury do not retire, a constable need not be sworn to attend them. 8 *Johns. Rep.*, 437.

Of receiving and entering the verdict. A verdict is the answer of the jury given in court concerning the matter of fact committed to their trial, wherein every one of the jurors must agree. *Jac. Law Dic.*, (*tit. Verdict.*)

It should be delivered to the justice publicly and in open court. 7 *Johns. Rep.*, 32.

When the jury return into court, the justice should call over their names, and if they all appear, the plaintiff should then be called; for any time before the verdict is rendered, he may suffer a nonsuit; and if the plaintiff should not appear, the justice should give judgment of nonsuit against him, for he cannot receive the verdict. 5 *Johns. Rep.*, 346. 10 *Wend. Rep.*, 522.

The justice should, however, be careful that both parties have an opportunity of being present at the time the jury are

ready to give their verdict, and not receive it in the absence of either party unless such absence be voluntary, for either party has a right to have the jury polled, that is, asked separately "Is this your verdict?" 3 *Johns. Rep.*, 255.

If the plaintiff, when thus called, answers, the verdict is to be received, and the justice will ask the jury, "who do you find for, the plaintiff or the defendant?" and the foreman of the jury will state what their verdict is, which the justice will enter in his docket, and then say to the jury, "Listen to your verdict as the court has recorded it. You say you find for the plaintiff, (as the verdict is,) and so say you all?" to which the jury signify their assent.

The law as to trials by jury in other courts, applies to justices' courts. Thus after a verdict is pronounced in court by the jury, they may alter it before it is recorded. 6 *Johns. Rep.*, 68. So after a verdict is received, either party may require that the jurors be polled, and either of the jurors may disagree to it; in which case they must be sent out again. 7 *Johns. Rep.*, 32. 3 *Johns. Rep.*, 255.

A verdict should usually be for a specific sum; but a verdict for a certain sum with interest from a particular time, is sufficient, and the justice may calculate the interest, but he should make the calculation and submit it to the jury before the verdict is recorded. 1 *Scam. Rep.*, 115.

A verdict of *no cause of action* is, substantially, a verdict for the defendant, and the justice should so enter the judgment. 2 *Johns. Rep.*, 181.

A verdict for more damages than the party has demanded in his declaration or set-off is merely a defect in form: he may remit the excess, and take judgment for the residue. 3 *Johns. Rep.*, 433. 1 *Scam. Rep.*, 539.

Where the jury are empannelled before Sunday commenced, it is proper to receive the verdict on Sunday, if the jury do not agree before; but the justice must wait till the next day before he enter judgment thereupon. 13 *Johns. Rep.*, 119.

Of discharging the jury. Justices should not too readily listen to the application from a jury to be discharged in case of disagreement, for, in most cases, it is not to be expected that a jury will at once all agree in opinion upon a case submitted to them. Juries should not be discharged because upon the first comparing of opinions there happens to be a disagreement. Temperate discussion may produce unanimity, and time should be allowed for that purpose; but when such time has been allowed, and the court becomes satisfied that there is no reasonable prospect of an agreement by further discussion, it becomes their duty to discharge. A jury should not be kept out so long that their verdict may be the effect of compulsion and not of their reason and under-

standing. 1 *Johns. Cas.*, 275, 301. 18 *Johns. Rep.*, 187. 13 *Wend. Rep.*, 55.

V. OF REFERRING THE CAUSE TO ARBITRATORS.

Gale's Stat., 407. "SEC. 20. In all cases the parties to a suit before a justice shall have the privilege of referring the difference between them to arbitrators, mutually chosen by them, who shall examine the matter in controversy, and make out their award thereon in writing, and deliver the same to the justice, who shall enter the said award on his docket, and give judgment according thereto."

CHAPTER VIII.

OF EVIDENCE.

EVIDENCE is used in the law for some proof by records, or writings, or by testimony of men on oath. Evidence contains testimony of witnesses, and all other proofs to be given and produced to a jury, (or to the justice in case of trial without a jury,) for the finding of any issue joined between the parties. *Jac. Law Dic., title Evidence.*

By the 11th section of "An act concerning justices of the peace and constables," it is provided that "All evidence before a justice of the peace shall be under oath, and by parol, except where it shall be necessary to exhibit the signature or hand writing of the party against him, and except such evidence as shall be taken by deposition." *Gale's Stat.*, 405.

The present design is to give only a few of the general rules relative,

1. To written evidence;
2. To parol evidence.

1. *Of written evidence.*

Written instruments are either public or private, or of a mixed nature, partly public and partly private. The acts of the legislature are records written on the rolls of the legislature, and are of the highest proof. They are of two kinds; public acts, which relate to the whole state at large, and private

acts, which relate to particular classes of men, or to certain individuals.

The general rule is, that public acts of the legislature are to be taken notice of judicially by courts of law without being formally set forth. They are merely referred to as it were to refresh the memory. 1 *Scam. Rep.*, 73. But where the act is of a private nature, it will not be regarded by the judges unless formally shown and pleaded. 1 *Starkie Ev.*, 196.

Gale's Stat., 287. "SEC. 1. That the printed statute books of this state and of the late territories of Illinois and Indiana, printed under the authority of said state and territories, shall be evidence in all courts and places of the private acts therein contained."

By a statute of the United States, passed May 26, 1790, it is provided "That the acts of the legislature of the several states shall be authenticated by having the seal of their respective states affixed thereto."

It has been held, in this state, that an act of the legislature of the state of Ohio, certified by the secretary of state, to which is appended a certificate of the governor with the seal of the state affixed, certifying to the official character of the person signing himself as secretary, and that full faith and credit are to be given to his official acts, is not a compliance with the act of congress. The seal of state should be affixed to the act itself. 1 *Scam. Rep.*, 424.

Gale's Stat., 287. "SEC. 2. The printed statute books of the several states and territories of the United States, purporting to be printed under the authority of those states and territories, shall be evidence in all courts and places, of the legislative acts of those states and territories respectively."

"SEC. 5. An exemplification by the secretary of this state of the laws of the other states and territories, which have been, or shall hereafter be transmitted by order of the executive or legislatures of such other states or territories, to the governor of this state, and by him deposited in the office of the said secretary, shall be admissible as evidence in any court of this state."

The statute laws of one state cannot be noticed by the courts of another, unless they are pleaded. 8 *Mass. R.*, 99. And it has been decided in Kentucky that the laws of a sister state cannot be judicially noticed there, but must be proved. 2 *Marsh*, 609. It has, however, been decided in this state, that it is no error to admit in evidence the laws of another state when they are like our own, even where there is no averment of such laws in the declaration. 2 *Scam. Rep.*, 9.

A record of court may be proved either by the mere production of it, or by a copy. On account of the inconvenience to the public of removing such documents, they are but seldom produced in evidence, and are commonly proved by a copy. 1 *Starkie Ev.*, 189.

Copies of records in courts of justice are of two kinds, under seal and not under seal.

Those under seal are called exemplifications, and are under the great seal or under the seal of the particular court. *Gilb. Ev.*, 12.

A record to be exemplified under the great seal must be a record of chancery, which is the centre of all the courts; or must be removed thither by *certiorari*. 2 *Bac. Ab.*, 610.

In this state, the great seal of the state is kept by the person administering the government of the state, and chiefly for authenticating commissions, patents, and the like purposes, and is not used for the judicial proceedings.

The supreme court, and the circuit courts of this state, have their respective seals, and the records of these courts are authenticated under the seal of the court in which they remain.

The second sort of exemplifications are those under the seal of the court where the record is kept; and such are of higher credit than any sworn copy. *Phil. Ev.*, 307. In general, the exemplification of any record under the seal of one of the courts of justice is sufficient. 10 *Coke Rep.*, 93, *a*.

The statute of the United States, passed May 26, 1790, provides "that the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law, or usage in the courts of the state from whence the said records are or shall be taken."

By the second section of a supplementary statute, passed March 27, 1804, all the provisions of the statute of 1790 are made to "apply as well to the public acts, records, judicial proceedings, and courts of the respective territories of the United States, and countries subject to the jurisdiction of the United States, as to the public acts, &c., of the several states."

The judgment of a court of general jurisdiction in any state in the Union, is equally conclusive upon the parties in all other states as in the state in which it was rendered, unless it appear by the record that the defendant was not served with process, and did not appear in person, or by attorney. 6 *Wend. Rep.*, 447.

If the jurisdiction of the court as to the subject matter, or person, is not impeached, the record of such judgment is entitled to full faith and credit. 5 *Wend. Rep.*, 148.

A record from another state is conclusive evidence of the debt claimed; it imports absolute verity, and nothing can be alleged against it. *Breese Rep.*, 258.

Copies of the records not under seal, are of two kinds; sworn copies, and office copies.

Sworn copies are the copies of records which the witness who produces them swears he examined with the original, taken from the proper place of deposit. 4 *Camp. Rep.*, 372.

Not only records, but all public documents which cannot be removed from one place to another, may be proved by means of a copy proved on oath to have been examined with the original; and it is a general rule, that whenever the original is of a public nature, a sworn copy is admissible in evidence; and that, whenever the thing to be proved would require no collateral proof upon its production, it is provable by copy; and that, conversely, where the document when produced would require support from collateral proof, a copy of it is not admissible. And, therefore, where an application was made that an examination before a magistrate might be produced upon the trial of a cause, it was ordered, because the examination itself, if produced, would not in itself be evidence, without proof of the hand writing of the party. 1 *Starkie Ev.*, 192.

When a record has been lost, a copy may, in some instances, be read in evidence, without proof upon oath that it is a true copy. But to warrant such evidence, the document must be, according to the rule of the civil law, confirmed by antiquity, or by judicial cognizance. In trover, if a *fieri facias* or *venditioni exponas* be lost, other evidence is admissible. 1 *Starkie Ev.*, 194. And so facts which have become matter of record may be proved by secondary evidence, after proof is given of the existence and loss of the record. 12 *Mass. Rep.*, 400.

Process cannot be proved by parol, but the process itself or a sworn copy must be produced; and if the original be lost, it must be accounted for. 12 *Johns. Rep.*, 456.

The right of proving papers by a sworn copy, is by no means confined to the cases mentioned. Wherever the writing to be proved is of a public nature, and, therefore, properly confined to a single place for the inspection of all whom it may concern, a sworn copy is good evidence. Thus, not only the records, books, and other papers properly and officially on file, or belonging to the various offices of state, and of courts of justice, are susceptible of proof in this manner, but a great variety of others of inferior importance or authority, as those in the official custody of the county commissioners' court, school commissioners, county treasurer, treasurers appointed by trustees of schools, and the proper officers appointed by other municipal corporations. 1 *Starkie Ev.*, 192. And it is doubtless within the same principle that a sworn copy of a justice's docket is evidence. 14 *Serg. & Rawle*, 410.

Office copies are such as are authenticated under the hand of an officer, or a person entrusted for that purpose. *Phil. Ev.*, 310.

Where the law entrusts a particular officer with the making

of copies, it also gives credit to them, in evidence, without further proof. 1 *Starkie Ev.*, 190.

Provision is made by the statute that "every deed, conveyance, or other writing, of, or concerning any lands, tenements, or hereditaments, which, by virtue of this act shall be required or entitled to be recorded as aforesaid, being acknowledged or proved according to the provision of this act, whether the same be recorded or not, may be read in evidence without any further proof of the execution thereof, and if it shall appear to the satisfaction of the court that the original deed so acknowledged, or proved, and recorded, is lost or not in the power of the party wishing to use it, a transcript of the record thereof, certified by the recorder in whose office the same may be recorded, may be read in evidence, in any court of this state, without proof thereof." *Gale's Stat.*, 153.

The official certificate of any register or receiver of a land office of the United States to any fact or matter on record in his office, shall be received in evidence in any court in this state, and shall be competent to prove the fact so certified. *Gale's Stat.*, 287. 1 *Scam. Rep.*, 184.

Sess. Laws, 1842–3, *p.* 140. It is provided by this act, "That a copy of all papers, books or proceedings, or parts thereof, appertaining to transactions in their corporate capacity, of any town or city heretofore incorporated, or now incorporated, or that hereafter may be incorporated, under a general or special law of this state, certified to be true copies by the clerk or the keeper of the same under the seal of said town or city, or under the private seal of said clerk or keeper if there be no public seal; the said clerk or keeper also certifying that he is entrusted with the safe keeping of the originals of which he gives certified copies, shall be received as *prima facie* evidence of the facts so certified in all the courts of this state in any suit or proceeding pending before them."

A copy of a marriage license, and certificate of the justice of the peace solemnizing the marriage, properly authenticated by the clerk of the county commissioners' court, in whose office the original license and certificate were filed, is admissible in evidence to prove such marriage. 2 *Scam. Rep.*, 231.

By the first section of the statute of the United States, passed March 27, 1804, "all records and exemplifications of office books which are kept in any public office of any state, not appertaining to a court shall be proved or admitted in any other court or office in any other state, by the attestation of the keeper of the said records, or books, and the seal of his office thereunto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is, or may be kept, or of the governor, the secretary of state, the chancellor, or the keeper of the great seal of the state, that the said attestation is in due form, and by the proper officer, and the said certifi-

cate, if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified, and if the said certificate be given by the governor, the secretary of state, the chancellor, or the keeper of the great seal, it shall be under the great seal of the state in which the said certificate is made, and the said record and exemplification, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of the state from whence the same are or shall be taken."

The second section provides that the first section, and the act of 1790, shall apply to books, records, offices, &c., of the territories of the United States and countries subject to the jurisdiction of the United States.

In the case of King *v.* Dale, 1 *Scam. Rep.*, 513, one of the questions was as to the sufficiency of the authentication of the certificate of marriage under the above act. Wilson, Chief Justice, in delivering the opinion of the court, says: "An inspection of the record will show it to contain an exemplified copy of a license issued in the state of Tennessee, for the marriage of John Dale to Cynthia Smith. On the back of this license is endorsed a certificate of a justice of the peace that he solemnized the marriage. The official character of the officer granting the license, and also that of the one performing the ceremony, is authenticated by the certificate of the clerk, the keeper of the records under his seal of office. The presiding justice then certifies to the authority and official character of the clerk, whose attestation in turn verifies that of the justice. These several authentications are by the accredited officers of the law, and in the form and order prescribed by the act of congress to entitle records and public acts to the same faith and credit in the courts of the several states that they have by law in the courts of the state from whence they are taken. The certificate of marriage was, therefore, properly received in evidence."

Of proving the proceedings in a justice's court. The proceedings and judgment in a justice's court are not strictly and technically a record; yet the material parts are in writing, and ought to be produced. Parol evidence of such proceedings is not the highest or best evidence in the power of the party, and ought not, therefore, to be admitted. 11 *Johns. Rep.*, 166. The proceedings before justices of the peace, under the statutes conferring jurisdiction in civil cases, come within the rules for proving books and documents of a public nature. 14 *Serg. & Rawle*, 440. And so, probably, do any other proceedings before a justice of the peace, where he acts in a judicial capacity.

A judgment of an inferior court not of record, is usually established by the production of the book containing the minutes of the proceedings of the court, from the proper place of deposit, proved to be such by oral testimony. And it appears that, in the case of an inferior court, evidence should be given of the proceedings previous to the judgment, as well as the judgment itself, in order to show that the proceedings were regular. 1 *Starkie Ev.*, 256. The docket of a justice of the peace may be proved by its production, verified by the oath of the justice, 10 *Wend. Rep.*, 525, and so may the process, declaration, plea, or other paper in the course of the cause.

Copies of proceedings in inferior courts are, also, evidence, since the originals are public documents. 2 *Bac. Ab.*, 632. And it is said that as it is not usual for inferior courts to draw up their records in form, but only short notes, copies of those short notes are good evidence. 1 *Starkie Ev.*, 256. A sworn copy of the docket of a justice of the peace may be received in evidence, 3 *Johns. Rep.*, 429, and so may a copy of the process and other papers in a cause.

It has been held sufficient evidence of a judgment recovered before a justice of the peace, who is since dead, for the party to prove the death of the justice, and to produce the original minutes of the judgment in the hand writing of the justice, with proof to verify those minutes. 13 *Johns. Rep.*, 430.

The most usual way of proving the proceedings and judgments in justices' courts is, by copies certified under the statute which provides that "copies of proceedings and judgments before justices of the peace, certified by the justice or justices under his or their hands or seals, before whom such proceeding or judgment is had, shall be received as evidence of such proceeding or judgment. Where such certified copy is to be used as evidence in any county other than that in which the justice or justices so certifying shall reside, the same, shall not be received as evidence, unless a certificate from the clerk of the county commissioners' court, (with the seal of the court,) shall be annexed thereto, certifying that on the day on which such proceeding was had, or judgment rendered, such justice so granting the same was a justice of the peace duly commissioned and sworn." *Gale's Stat.*, 287.

The above statute directing the manner in which such proceedings may be authenticated, seems to regard them in the nature of a record.

When it is necessary to prove the proceedings and judgment in any case before a justice of the peace, it seems most proper that they should be proved by a copy certified by the justice. In prescribing this mode of proof, it was, undoubtedly, the intention of the legislature to relieve justices of the peace from the necessity of attending as witnesses with their dockets, as well as to remedy the inconvenience to the public in their being removed from place to place, as they would be

in danger of being lost or damaged, and, perhaps, might be wanted in different places at the same time.

The justice may, doubtless, state in his docket, the matters which were actually tried before him, and what was submitted to, or withdrawn from, the consideration of the court, or jury, where he shall deem either to be material. The transcript then exhibits such facts. 13 *Johns. Rep.*, 184.

If the certified copy omit to state what was submitted, or withdrawn, from the consideration of the court or jury, this may be proved by parol evidence. 16 *Johns. Rep.*, 136.

The statute authorizing the proceedings and judgment before justices of the peace to be proved by certified copies, it is presumed, contemplates that such proceedings should be certified as would show that the justice had jurisdiction, not only of the person, but also of the subject matter, as the jurisdiction of a court rendering a judgment is always a subject of enquiry in every other court in which such judgment is sought to be enforced. *Breese Rep.*, 258. 2 *Scam. Rep.*, 468.

In the case of Trader *v.* McKee, 1 *Scam. Rep.*, 558, Lockwood, Justice, says: "It appears from the bill of exceptions taken in the cause, that the action was founded on several judgments obtained before a justice of the peace in the state of Indiana, by McKee against M. and T. Trader. The defendant below objected to the transcripts of the judgments rendered by the justice of the peace, as evidence in the cause, which objection the court overruled, and received the transcript in evidence, and gave judgment for the plaintiff below. Among other errors relied on is the following, to wit: 'That it does not appear from the evidence offered, that the justice before whom the judgments purport to have been rendered had any jurisdiction over the persons of the defendants, or over the subject matter of said actions.' The law is well settled that in courts not of record, in order to justify their taking cognizance of a cause, their jurisdiction must affirmatively appear. In order to have received these transcripts in evidence, it was incumbent on the plaintiff to have shown that, by the laws of Indiana, the justice of the peace had jurisdiction of the subject matter upon which he attempted to adjudicate."

Of the proof of private writings. The execution of every instrument to which there is a subscribing witness, whether under seal or not, ought to be proved by the subscribing witness, if he can be procured, and is capable of being examined. *Phil. Ev.*, 411. And this rule is so strictly observed, that a deed executed by a third person, not a party to the suit, to which there is a subscribing witness, cannot be proved by the party executing it, nor by the party to whom it is given, but the subscribing witness should be called. *Phil. Ev.*, 412.

The order of proof of a sealed instrument to which there is a subscribing witness, is as follows:

1. The witness must be produced, if practicable.

2. If he cannot be found, or his testimony cannot be used, his hand writing must be proved.

3. If his hand writing cannot be proved, after diligent exertion for that purpose, proof of the hand writing of the party executing the instrument is admissible. 13 *Wend. Rep.*, 178.

If a written instrument is attested, but none of the witnesses are capable of being examined, the course then is to prove an attesting witness's hand writing, and this will be a sufficient proof of the execution, without proving the hand writing of the party, as when the attesting witness is dead, 1 *Johns. Cas.*, 230. 4 *Wend. Rep.*, 313, or blind, or incompetent to give evidence, either from insanity, or from infamy of character, or from interest; or when the subscribing witness is out of the state or jurisdiction of the court; 4 *Johns. Rep.*, 461. 12 *Johns Rep.*, 188; or where he cannot be found after strict and diligent inquiry; or where he has kept out of the way at the instance of the opposite party. 1 *Starkie's Ev.*, 325.

If there be two or more subscribing witnesses, the calling of one to prove the instrument is sufficient; or if the absence of all of them be accounted for, proof of the hand writing of one of them, or of the party signing the instrument, will be sufficient. 1 *Starkie's Ev.*, 328-9, *and note* (1.) So when one of the attesting witnesses, after diligent enquiry made, cannot be found, and the other has become interested since the attestation, evidence of the hand writing of the latter witness is sufficient. So when one of two witnesses is dead and the other denies his signature, evidence of the hand writing of the former will be admitted. 1 *Starkie's Ev.*, 329. But if there be two or more subscribing witnesses, it is not enough to prove one of them dead or out of the jurisdiction of the court, and then prove his hand writing with that of the party; but the absence of all the subscribing witnesses must be accounted for. 5 *Cowen's Rep.*, 383.

In case where there is no subscribing witness, or the subscribing witness denies having any knowledge of the execution, or where the name of a fictitious person is inserted, or where the attesting witness was interested at the time of the execution, and continues so at the time of trial, or where the person who has put his name as a subscribing witness did so without the knowledge or consent of the parties, or if, after diligent enquiry, nothing can be heard of the subscribing witness, so that he can neither be produced himself, nor his hand writing proved, or if at the time of the execution he was such an infamous character as to make him incompetent to give evidence; in these cases the instrument may be proved by proving the hand writing of the party, or by any person present at the execution who did not subscribe it as a witness, or by proof of the admission of the party that he executed the instrument. *Phil. Ev.*, 420.

Where an instrument in writing has been lost or destroyed,

the fact must be proved. If positive proof of the destruction cannot be had, it must be shown that a *bona fide* and diligent search has been made for it in vain, where it was likely to be found, 1 *Starkie's Ev.*, 336, and the testimony of the party, or of an interested witness, is admissible as to the loss of an instrument, so as to lay the foundation for the introduction of inferior proof of its execution and contents, which testimony must be addressed to the court solely. 1 *Starkie's Ev.*, 336, *note* (2.) It appears that the proper course is to present to the court an affidavit of the loss, and then secondary evidence may be admitted of its contents. 2 *Scam. Rep.*, 236.

In general, one party has not the means of compelling the other party to produce any writings in his possession, however necessary they may be for the prosecution of his suit. If such evidence is required, the rule is to give to the opposite party, or his attorney, notice to produce the original, and if he should omit or refuse to produce it, the party who has done all in his power to supply the best evidence, will be allowed to go into evidence of an inferior kind, and may read an examined copy or give parol evidence of the contents. It should, however, be shown that the writing is in the hands of the other party. *Phil. Ev.*, 389.

Proof of hand writing. The best evidence to prove the hand writing in question, is that of a witness who actually saw the party write it: such direct evidence can, however, seldom be procured. 1 *Starkie's Ev.*, 372.

The hand writing of a person may, therefore, be sufficiently proved by a witness who was previously acquainted with his hand writing, and who testifies that he believes the hand writing in question to be his. This previous acquaintance with the hand writing of a person may be derived from having seen the person write, or from papers received in the course of business, which there is sufficient reason to believe were written by the party, as from letters received in due course in answer to those sent; from notes which have been paid, &c. 1 *Starkie's Ev.*, 373. 19 *Johns. Rep.*, 134.

Hand writing cannot be proved by comparing the paper in dispute with other papers acknowledged to be genuine. *Phil. Ev.*, 428.

If the witness has no previous knowledge of the hand writing, he cannot be permitted to decide it in court from a comparison of hands. 9 *Cowen's Rep.*, 94. By comparison is meant an actual comparison of two writings with each other in order to ascertain whether both were written by the same person. 1 *Starkie's Ev.*, 374.

The statute has made the following provision in regard to written instruments when introduced as evidence in certain cases:

Gale's Stat., 405. "SEC. 12. No party to any suit before a justice shall be permitted to deny his or her signature to any

written instrument upon which such suit shall be founded, or which shall be offered as a set-off, or acquittance for the debt demanded in such suit, unless the said denial be under the oath of the party so denying the signature purporting to be his or her own."

A landlord distrained the goods of his tenant for rent, and they were afterwards taken in execution by the creditors of the tenant. On the trial of the right of property the landlord offered and read in evidence the lease between him and his tenant, without proving its execution. The court say the appellants' (creditors') names were not signed to the lease, nor were they any way privy to it; they, therefore, had a right to require proof of its execution, and the party offering it was bound to make such proof before it could be legally given in evidence. 1 *Scam. Rep.*, 343.

Sess. Laws, 1838–9, *p.* 271. "SEC. 2. In actions upon bonds, notes, and all other writings made assignable by law, in the name of the assignee, the plaintiff shall not be held bound to prove the assignments or the signature of any assignor unless the fact of assignment be put in issue by plea, verified by the affidavit of the defendant or some credible person, stating that he verily believes the facts stated in the plea are true."

Of parol evidence to explain, vary, or contradict written instruments. Parol evidence is not admissible to explain an ambiguity which appears on the face on an instrument, but it can be explained only by collecting the general intention from the other parts of the writing, or by a reference to some event, or some other writing, or some medium of explanation adverted to in the instrument. If it be incapable of being explained in this way, it will be void for uncertainty. The declaration of the parties as to their intention, is inadmissible. *Phil. Ev.*, 473. 11 *Johns. Rep.*, 201. 2 *Starkie's Ev.*, 546. *Breese Rep.*, 231.

But where there is no ambiguity on the face of the instrument, but a doubt is produced by extrinsic evidence, or some collateral matters out of the instrument, as if it should appear that there were two persons of the same name as is mentioned in the instrument, parol evidence is admissible to explain the ambiguity and show which person was intended. *Phil. Ev.*, 467. 11 *Johns. Rep.*, 201. 2 *Starkie's Ev.*, 559.

It is a general rule that written agreements, whether specialties or simple contracts, and whether within or without the statute of frauds, are not to be contradicted, varied, or materially affected by oral testimony. 1 *Starkie's Ev.*, 548. 1 *Cowen's Rep.*, 249. 12 *Johns. Rep.*, 427, 488.

Thus, the defendant cannot be admitted to prove that at the time of making a promissory note, it was agreed that when the note became due payment should not be demanded, but that the note should be renewed. So parol evidence is not admissible to show that an agreement, absolute on its face, was intended

merely as an indemnity, 2 *Starkie's Ev.*, 552, or to show a mistake as to the time of payment or other matters. 8 *Johns. Rep.*, 375. 189. 18 *Johns. Rep.*, 45.

The above rule, however, does not exclude parol evidence of fraud, or the want or failure of consideration, or the enlargement of the time for performance, or the waiver of the performance of a written simple contract. 1 *Cowen's Rep.*, 249. 2 *Starkie's Ev.*, 555.

A receipt, although absolute in its terms and expressed to be in full, is not conclusive, and parol evidence is admissible to show a mistake in it, or to explain or contradict it. 7 *Cowen's Rep.*, 334. 5 *Johns. Rep.*, 72. 2 *Starkie's Ev.*, 702.

A receipt in full of all demands, is *prima facie* evidence of the payment of all notes and claims existing at the time the receipt is given. 1 *Scam. Rep.*, 270.

2. *Of parol evidence.*

It is a general rule, that all persons are competent witnesses who have sufficient understanding, and are not disqualified by interest, crime, or want of a proper sense of moral obligation to speak the truth. 1 *Scam. Rep.*, 32.

When a witness appears he must be regularly sworn, unless an objection be made to his *competency*. An exception to the credibility of a witness cannot exclude him from being sworn. Husband and wife cannot be witnesses for or against each other in civil suits. 2 *Starkie's Ev.*, 399.

The objection to competency of witnesses will be considered in the following order:

1. For want of sufficient understanding;
2. For want of proper sense of moral obligation;
3. On account of crime; and,
4. On the ground of interest.

1. *For want of sufficient understanding.* To render the communication of facts perfect, the witness must be both able and willing to speak the truth. 1 *Starkie's Ev.*, 17. Persons who have not the use of reason are, from their infirmity, incapable of giving evidence, as persons insane, idiots, and lunatics, under the influence of their malady. 10 *Johns. Rep.*, 362. 16 *Johns. Rep.*, 143. But lunatics, and others who are subject to temporary fits of insanity, may be witnesses in their lucid intervals, if they have sufficiently recovered their understanding.

A person born deaf and dumb is not on that account incompetent, but if he has sufficient understanding, may give evidence by signs, with the assistance of an interpreter. *Phil. Ev.*, 16.

There is no precise age at which infants are excluded from being witnesses. Infants above fourteen are admissible, the same as of full age. But under that age their admissibility is

regulated by their apparent sense and understanding of the nature and obligation of an oath. *Phil. Ev.*, 16.

A witness, when in a state of intoxication, ought not to be sworn, nor be permitted to testify; and the justice may decide, from his own view, whether the witness is in such a situation that he ought not to be sworn, or admitted to testify. 16 *Johns. Rep.*, 143.

Gale's Stat., 536-7. "SEC. 3. A negro, mulatto, or Indian shall not be a witness in any court, or in any case, against a white person. A person having one fourth part negro blood shall be adjudged a mulatto."

2. *For want of a proper sense of moral obligation.* The proper test of a witness's competency on the ground of his religious principles is, "whether he believes in the existence of a God who will punish him if he swears falsely." 2 *Cowen's Rep.*, 432, *and note.*

All persons who believe in the existence of a God and a future state, though they disbelieve in a punishment hereafter for crimes committed here, are competent witnesses. *Breese Rep.*, 29.

A witness who believes in a God, and in punishment by Him in this life only, is a competent witness. It is not necessary, in order to render a man a competent witness, that he should believe any thing more than that there is a Supreme Being, and that he will reward and punish either in this life or a future life. Nothing but the belief of a God, and that he will reward and punish us according to our deserts, is necessary to qualify a man to take an oath. 2 *Cowen's Rep.*, 572, *note.* 1 *Starkie's Ev.*, 93.

If a witness believes that he will be punished by his God, even in this world, if he swear falsely, there is a binding tie upon the conscience of the witness, and he must be sworn; and the strength or weakness of that tie is only proper to be taken into consideration in deciding upon the degree of credit which is to be given to his testimony. It is a question as to his credibility, and not to his competency. 2 *Cowen's Rep.*, 433, *note.* It has been decided in Massachusetts, that, although a witness disbelieves in a future state of existence, yet he is competent, and the question goes only to his credibility. 15 *Mass. Rep.*, 184.

As the object of the oath is to bind the conscience of the witness, it follows that some form of swearing must be used which the witness considers to be binding; and, therefore, every witness is now sworn according to the form which he holds to be most solemn, and which is sanctified by the usage of the country or of the sect to which he belongs. A Jew is sworn on the Pentateuch, a Mahometan on the Koran, &c. So it has been held that a Scottish covenanter may be sworn according to the form of his sect by holding up his hand without kissing the book. 1 *Starkie's Ev.*, 23.

By the statute of this state, those persons who have conscientious scruples about laying the hand on, and kissing the gospels, may, with the hand uplifted, *swear by the ever living God;* and such persons as have conscientious scruples against taking an oath, may affirm. *Ante*, 430–1.

The proper time for asking a witness whether the form in which the oath about to be administered to him is one that will be binding upon his conscience, is before that oath is administered; but, although a witness shall have taken the oath in the usual form, without making any objection at the time, he may, nevertheless, be afterwards asked whether he considers the oath he has taken to be binding on his conscience. But if the witness answers in the affirmative, he cannot then be further asked whether there be any other mode of swearing that would be more binding upon his conscience than that which has been used. And, in general, the objection to a witness on account of his competency, ought to be made before he has been sworn and examined in chief. 1 *Starkie's Ev.*, 92–3.

3. *On account of crime.* The mere conviction, properly evidenced, of some crime, was always sufficient, as it is at present, to render the offender infamous, whilst some punishments of a personally degrading character had, also, the same effect, whatever the crimes might be for which they were inflicted; but it is now settled on better principles, that it is the crime and not the punishment which creates the infamy and destroys the competency of the witness. At the present day, therefore, a conviction of treason or felony, or any species of *crimen falsi* of the Roman laws, such as forgery, prejury, swindling, cheating, subornation of perjury, barratry, or other like offences which necessarily imply falsehood; or for conspiracy to accuse another of a crime, bribing a witness to absent himself, and the like cases, will incapacitate the party convicted from giving evidence, while it continues in force, without regard to the punishment inflicted. 9 *Cowen's Rep.*, 707. *Phil. Ev.*, 24. 1 *Starkie's Ev.*, 79.

In order to urge the disability with effect, it is necessary to prove the record of the judgment as well as of the conviction; and the admission of the witness himself will not suffice without a copy both of the judgment and conviction. 9 *Cowen's Rep.*, 708. 2 *Wend. Rep.*, 527.

A pardon removes not only the punishment, but also all disabilities consequent upon conviction, and restores the competency of the party as a witness. 1 *Starkie's Ev.*, 99.

The effect of a pardon is to acquit the offender of all penalties annexed to the conviction, and to give him new credit and capacity. 10 *Johns. Rep.*, 233. The pardon, however, under the great seal must be produced, and if the pardon be a conditional one, it must be shown that the condition has been performed. 1 *Starkie's Ev.*, 109. 2 *Caine's Rep.*, 57.

4. *On the ground of interest.* It is a general rule, that all persons interested in the event of a suit are to be excluded from giving evidence in favor of the party to which their interest inclines them. *Phil. Ev.*, 36.

The law, however, defines the kind of interest which shall exclude. It must be a *legal interest* in the event, as contradistinguished from affection, prejudice, or bias. Hence, although a man and his wife cannot give evidence for each other, yet no other degree of relationship or connection in society, whether natural or artificial, will incapacitate the parties from giving evidence for each other. A father is a competent witness for his son and the son for his father; the guardian and ward, the master and servant, may mutually give evidence for each other. 1 *Starkie's* Ev., 18, 19.

A party to a suit, whether he is the real party or is but nominal party, is incompetent to be a witness, if objected to. 1 *Starkie's Ev.*, 105. 4 *Wend. Rep.*, 453. 9 *Wend. Rep.*, 286.

In an action upon a contract against several, where one of the defendants sets up a defence personal to himself, and judgment is thereupon rendered in his favor, the cause, as to him, is adjudicated, and he is not incompetent as a witness, by reason of his having been a party to the action. 4 *Scam. Rep.*, 309.

It has been decided by our supreme court, that if a party in interest is not also a party to the record in a suit, he may, at the instance of the opposite party, be compelled to testify as a witness against his own interest; provided his answers do not subject him to a criminal prosecution, or to a penalty or forfeiture. 4 *Scam. Rep.*, 309.

Gale' Stat., 344. "Sec. 6. In the trial of any action wherein it shall appear by the pleadings, that the fact of usury shall be put in issue, it shall be lawful for the debtor, the creditor being alive, to become a witness, and his testimony shall be received as evidence, and the creditor, if he shall offer his testimony, shall be received as a witness, together with any other legal evidence that may be introduced by either party."

Gale's Stat., 420. "Sec. 5. In all trials before justices of the peace, when either party may not have a witness or other legal testimony, to establish his or her demand, discount, or set-off, the party claiming such demand, discount, or set-off, may be permitted to prove the same by the testimony of the adverse party; and if such adverse party shall not appear at the time of trial, or shall refuse to be sworn, or to testify, then the party claiming the same shall be permitted to prove his or her demand, discount, or set-off, by his or her own oath: *Provided*, that such party claiming the benefit of his own oath, or that of the adverse party, shall first make oath that he has a demand, discount, or set-off, in said cause, and that he knows of no witness by whom he can prove the same, except by his

own oath, or that of the adverse party: *Provided further*, that no person shall be allowed to prove his demand, discount, or set-off, unless the adverse party be present, or shall have been notified thereof, and for which purpose the justice may continue the cause for such time as may be necessary."

The notice required by the above section must be given to the adverse party personally, and a notice to his attorney is not sufficient. 1 *Scam. Rep.*, 265.

Gale's Stat., 429. "SEC. 1. That in all cases before justices of the peace, where the plaintiff shall wish to prove his or her demand, by his or her own oath, or the oath of the adverse party according to the provisions of the 5th section of the act to which this is an amendment, it shall be lawful for the justice of the peace before whom the suit is commenced, to issue a summons" [in the form prescribed in the 3d sec. of the act of Feb. 3, 1827, entitled "An act concerning justices of the peace and constables," and to insert therein a notice to the defendant that the plaintiff says that he has no witness by whom to prove his demand, except it be by his own oath, or the oath of the said defendant; and unless the defendant appear at the trial of said complaint, the plaintiff will be permitted to prove his demand by his own oath, as by law directed in other cases;] "and if the defendant or defendants shall not appear at the time of trial, after being served with such summons according to law, and no sufficient reason be assigned to the justice why he or she does not appear, then the plaintiff shall be permitted to prove his or her demand by his or her own oath, as is now provided by law, without giving any other or further notice to the defendant or defendants.

"SEC. 2. Nothing here contained shall be construed so as to prevent any plaintiff or defendant, in any suit pending before a justice of the peace, from proceeding as is provided in the 5th section of the act to which this is an amendment."

When a party to a suit makes the necessary preliminary oath to authorize him to call upon the adverse party to testify, and either the adverse party or the party making such oath (the adverse party having declined testifying) is sworn, he does not become a general witness, but his testimony will be confined to "the demand, discount, or set-off" in reference to which he has been sworn. If the party has paid or discharged the demand in reference to which he was sworn and interrogated, he may state that fact, and such statement will be received as responsive to the question propounded to him. But, if he only claims that he is not legally bound to pay such demand, by reason of his having a subsisting account or set-off against the party calling on him to testify, he cannot proceed to establish such account or set-off by his own oath, by virtue of having been sworn at the instance of the

adverse party. He may have other and disinterested evidence to support such account or set-off and if so, should be required to produce it; but, if he has not any other means of sustaining such account or set-off except by resorting to his own oath, or his adversary's oath, he must first swear to that fact, and call upon his adversary to testify to such demand, before he can legally do so himself. 4 *Scam. Rep.*, 543.

An assignor of a note is not the adverse party contemplated by the statute permitting a party to prove his demand by the adverse party in a trial before a justice of the peace. 1 *Scam. Rep.*, 196.

A party in interest may be a witness to prove to the court the loss of the note or other instrument, in order to introduce secondary evidence of the contents thereof. The proper course is to present to the court an affidavit of the loss, and then secondary evidence may be admitted to prove the contents of such note or instrument to the jury. 2 *Scam. Rep.*, 236.

In all actions brought by or against every county, the inhabitants of the county suing or being sued may be witnesses, if otherwise competent or qualified according to law. *Gale's Stat.*, 159, § 6.

Statements or representations made by parties against their interests, may be given in evidence against them; and, in many cases, they will be the strongest evidence. The admission of a party to the suit against his interest, is evidence in favor of the opposite party, whether made by the real party on the record or by a nominal party who sues as trustee for the benefit of another, or whether by the party who is really interested in the suit, though not named in the proceedings. 1 *Stark. Ev.*, 22.

But, where the plaintiff previous to the suit had assigned his interest in the debt, or *chose in action*, of which the defendant had notice, evidence of confessions afterwards made by the plaintiff as to the demands of the defendant against him, and which might impair the interest so assigned, or prejudice the rights of the assignee for whose benefit the suit is brought, is inadmissible. 20 *Johns. Rep.*, 142.

The admission of an assignor of a promissory note as a witness to prove the time of the assignment, is improper. 1 *Scam. Rep.*, 417. 2 *Scam. Rep.*, 429.

It is a well settled rule of law, that, where one party relies on the admission of the other party, the whole admission must be taken together. 1 *Scam. Rep.*, 196. 10 *Johns. Rep.*, 38. Thus, if a defendant in an action for money had and received say that he had received the money but that it was his due, it amounts to a denial of the plaintiff's claim. 3 *Johns. Rep.*, 427. The confession of a defendant that he had purchased goods but that he had paid for them, is not sufficient to entitle the plaintiff to recover. 15 *Johns. Rep.*, 329.

An admission made for the purpose of buying peace, is not allowed to be taken advantage of for the purposes of evidence, since the offer may have resulted not from consciousness of the truth of the claim, but a desire to avoid litigation. Therefore, when it appears to be probable that such was the motive, the evidence is not admissible. 2 *Stark. Ev.*, 22.

But the clear and unqualified admission of certain articles of charge, or balance of account due, made in the course of a settlement, would be evidence. 2 *Stark. Ev.*, 22. 7 *Wend. Rep.*, 354. Where a witness is sworn in chief, he is bound to state all the facts in his knowledge that are applicable to the case and may legally be proved by parol, and neither the court nor the party calling him can separate his testimony, and take such part as they like, and reject the balance. 1 *Scam. Rep.*, 396.

In Van Neys *v.* Terhune, 3 *Johns. Cas.*, 82, the court lay down the following rule, "that if the witness will not gain or lose by the event of the cause, or if the verdict cannot be given in evidence for or against him in another suit, the objection goes to his credit only and not to his competency." 14 *Johns. Rep.*, 81. 1 *Hall's Rep.*, 619.

If the party has an interest inclining him to each party alike, he is a competent witness for either, as he would be liable to the same extent to whichever might be the losing party. 16 *Johns. Rep.*, 89.

A witness is not always incompetent because he is interested in the event of the suit. If his interest is balanced, or against the party calling him, he is competent. 4 *Scam. Rep.*, 167.

A vendor of personal property, liable to both parties on his warranty of title, is a competent witness for either party, his interest being neutralized. 3 *Wend. Rep.*, 486. 1 *Wend. Rep.*, 109.

A constable has an execution against you and takes your goods on it, another constable takes them from the first on another execution against you, or your landlord distrains them for rent, you are an indifferent witness between the contending claimants for your goods. 11 *Johns. Rep.*, 185.

Gale's Stat., 588. "That in no case of the trial of the right of property under this act, or the act to which this is an amendment, shall the defendant in execution be a competent witness."

Previous to this statute, it was decided that, in a trial of the right of property, the defendant in execution was a competent witness for the claimant, and that the interest which disqualifies must be in favor of the party calling the witness. 1 *Scam. Rep.*, 32.

A person interested in the event is competent when called

on to give evidence contrary to his interest. 1 *Johns. Rep.*, 159.

If the witness has not a legal and fixed interest in the event of the cause, the objection goes to his credit and not to his competency. 10 *Johns. Rep.*, 21.

An interest in the question alone, but not in the particular suit, will not disqualify the witness, but the objection goes to his credit only. 5 *Johns. Rep.*, 256. 7 *Cowen's Rep.*, 752.

In trespass, a defendant cannot regularly be a witness for his co-defendants; but if no evidence has been produced against him, he is entitled to his discharge as soon as the plaintiff has closed his case, and may then give evidence for the others. But if there is any evidence against him, however slight, he cannot be discharged before the rest, and the cause must go altogether to the jury. *Phil. Ev.*, 61. 6 *Cowen's Rep.*, 313.

If two persons are joined in the same process for a *tort*, and only one is served, the joint trespasser not served is a competent witness, for he is not a party to the suit for any purposes. 6 *Cowen's Rep.*, 313. 2 *Johns. Rep.*, 365. And the rule is the same in trover and all actions for *tort*. 15 *Johns. Rep.*, 223.

A stevedore, employed by the master to stow the cargo, is a competent witness to prove that it was properly stowed. 1 *Hall's Rep.*, 619.

Where a witness has a direct interest, however small, in the event of the cause, he cannot be admitted to testify in any respect in favor of such interest; as where he has given a bond of indemnity to the plaintiff against the costs of suit. 11 *Johns. Rep.*, 57.

When the fact to be proved by a witness is favorable to the party who calls him, and the witness will derive a certain advantage from establishing the fact in the way proposed; he cannot be heard whether the benefit be great or small. 16 *Johns. Rep.*, 89.

Where a witness is interested in any part of the demand of the plaintiff, he cannot be admitted to testify as to another part. 4 *Johns. Rep.*, 293.

When any witness, in any stage of the cause, discovers himself to be interested, his testimony may be rejected. 6 *Johns. Rep.*, 523.

The vendor of a chattel is not a competent witness in an action against the vendee for taking it away, for he is bound to warrant the title. 6 *Johns. Rep.*, 5.

When the witness is so situated that a legal right or liability, or discharge from liability, would immediately result, he is not a competent witness; as where the witness has indemnified the party against the result generally. 1 *Starkie's Ev.*, 106.

A joint debtor or co-partner with a person sued is not a

competent witness for the plaintiff, because his testimony would tend to charge the defendant with one half the debt which the witness might otherwise himself be liable to pay; 1 *Starkie Ev.*, 107. 21 *Wend. Rep.*, 397; nor could he be a witness for the defendant. 9 *Cowen's Rep.*, 128.

If, on the examination of a witness in chief, that is, generally, *on the merits of the case*, it is discovered that he is interested in the event of the action, a release may then be executed and he may be re-examined. 7 *Wend. Rep.*, 180. 3 *Wend. Rep.*, 296.

The objection to a witness on the ground of interest may be proved on his own *voire dire*, which is, that he shall, on his own oath, speak the truth whether he shall gain or lose by the matter in controversy; or his interest may be proved by other evidence. 1 *Starkie's Ev.*, 123. 7 *Wend. Rep.*, 180.

It lies on the party who objects to the competency of a witness on the ground of interest, to show an interest existing at the time of the proposed examination. 1 *Starkie's Ev.*, 124, *note* 2. 9 *Wend. Rep.*, 293.

When a witness is called and, on objection to his competency, put on his *voire dire*, and answers generally that he is interested, he should be rejected. The party calling him may, however, examine him to show that his interest is merely ideal, or such as will not exclude him. 3 *Cowen's Rep.*, 252. And so if he denies that he has any interest, he may be interrogated as to his situation. 1 *Starkie's Ev.*, 124, *note* 2.

The interest of a witness may be shown by other testimony, either parol or written; and in this case, when once established, strict proof is required of its discharge or termination. *Peake's Ev.*, 186.

In some of the states it has been decided that the election by the party of one of the above modes of establishing the interest of the witness, precludes a resort to the other. 1 *Starkie's Ev.*, 124, *note* 2. And so, it has been said, were the older English cases. *Peake's Ev.*, 186.

In later English cases, it has been held that the party whose witness appears, on other proof, to be interested, may himself call the witness in question and have him sworn on the *voire dire*, in order to contradict the appearances against him, explain away his apparent interest, or show that it has been discharged or removed. And no limitation to evidence on this issue, derivable from the witness's mere oath, seems to be settled. 2 *Cowen's Tr.*, 969. 5 *Carr. & Payne*, 197. 1 *Barn. & Cress.*, 689. The party objecting may examine the witness on the *voire dire*, and also, if necessary, call another witness to prove his incompetency. *Ros. Crim. Ev.*, 80, *Am. Ed. of* 1832.

If the witness discharge himself on his *voire dire*, the party who objects may still afterwards support his objection by evidence. 1 *Starkie's Ev.*, 124.

It would manifestly be unjust to preclude the party from impeaching the competency of a witness by satisfactory evidence, merely because he had taken the objection in the first instance in the proper mode, and the witness had been hardy enough to misrepresent his situation. 1 *Starkie's Ev.*, 124, *note e.*

It now appears to be settled in some of the states and in England, that a party may, in his election, omit the preliminary objection to a witness on account of his interest, and stake the exclusion of such witness on such testimony as can be obtained under the ordinary rule on general examination in the course of the trial. 4 *Dall. Rep.*, 151. 6 *N. H. Rep.*, 346. 7 *Wend. Rep.*, 180. *Phil. Ev.*, 101.

And such also appears to be the practice in the courts of this state. 2 *Scam. Rep.*, 535.

The objection to competency on the ground of interest is removed by an extinguishment of that interest, by means of a release executed either by the witness himself, or by those who have a claim upon him, or by payment, &c. 1 *Starkie's Ev.*, 124.

The credit of a witness may be impeached by cross-examination, or by evidence that he has before done or said that which is inconsistent with his evidence on the trial, or by contrary evidence as to the facts themselves, or by general evidence affecting his credit.

It is a general rule that, whenever the credit of a witness is to be impeached by proof of any thing that he has said, or declared, or done in relation to the cause, he is first to be asked upon cross-examination whether he has said, or declared, or done that which is intended to be proved. If the witness admits the words, declarations, or act, proof on the other side is unnecessary, and the witness may give such explanation as the circumstances may furnish.

If the witness deny the words, declaration, or act imputed to him, then, if it be not a matter collateral to the cause, witnesses may be called to contradict him.

In the next place, the witness may be contradicted by others who represent the fact differently, or by proof that he has said or written that which is inconsistent with his present testimony.

It is perfectly well settled, that the credit of a witness can be impeached by general evidence only, and not by evidence as to particular facts, for this would cause the inquiry, which ought to be simple and confined to the matter in issue, to branch out into an indefinite number of issues. 1 *Starkie's Ev.*, 182–3.

A witness, called to impeach or support the general character of another, is not to speak of his private opinion or of particular facts in his own knowledge; but he must speak of the common reputation among his neighbors and acquaintances.

The proper questions to be put are, whether he knows the general character of the witness intended to be impeached, in point of truth, among his neighbors; and what that character is; whether good or bad.

The witness may be enquired of as to the means and opportunities he has of knowing the character of the witness impeached; as, how long he has known him; how near he lives to him; whether his character has been a subject of general conversation; how long and how generally the unfavorable reports have prevailed; and from what particular individual he heard them. 1 *Starkie's Ev.*, 182, *and note* (1.) *Phil. Ev.*, 229. 7 *Wend. Rep.*, 258. 19 *Wend. Rep.*, 569.

A party cannot discredit the testimony of his own witness, or show his incompetency, for it would be unfair that he should have the benefit of the testimony if favorable, and be able to reject it if the contrary; but he may contradict him, and show the fact by other witnesses to differ from what he states it, and thus do away the effect of his testimony. 1 *Starkie's Ev.*, 185. 7 *Cowen's Rep.*, 235.

When the party calls an attesting witness, who denies his attestation; or a witness who has inveigled the party by making favorable statements to him, or to his attorney or counsel, in consequence of which he was called, but contradicts on oath what he stated before, he may be impeached by showing such former statement, or his general bad character, or other matter going to reduce his credibility, the same as if he had been called by the adverse party. *Cowen & Hill's notes to Phil. Ev.*, 779, 782. 1 *Starkie's Ev.*, 185.

A counsel or attorney is not permitted to testify as to confidential communications made to him by his client; and this prohibition extends not only to the suit in which the communication is made, but to any other suit, and to any period of time. 2 *Starkie's Ev.*, 229.

But an attorney or counsel may be called to testify to a collateral fact within his own knowledge, or to a fact which he knows without any communication from his client, as to prove his client's hand writing. 19 *Johns. Rep.*, 134.

CHAPTER IX.

OF JUDGMENTS, COSTS, AND FILING TRANSCRIPTS.

1. Of judgments.
2. Of costs.
3. Of filing transcripts.

1. OF JUDGMENTS.

In any cause, when the plaintiff appears and the defendant does not, and no sufficient reason is assigned why he does not, the justice shall proceed to determine the same in the absence of the defendant; and when the parties appear and are ready, and the cause is submitted to the justice for trial without a jury, the justice shall proceed to hear and examine their respective proofs and allegations, and thereon shall give judgment according to his finding; and when a cause is tried before a justice and a jury, the justice shall enter judgment upon their verdict according to the finding thereof. *Gale's Stat.*, 404, §§ 5, 9, & 21.

From this statute it appears that a justice of the peace has no power to arrest a judgment, or of suspending a judgment, by granting a new trial. There is no day given to either of the parties to appear in the court and show cause why judgment should not be rendered according to the finding of the justice, or the verdict of the jury. There is no discretion given to the justice; he is bound to render judgment as a matter of course.

Judgment is the sentence of the law pronounced by the court upon the matters contained in the record. 3 *Bl. Com.*, 395.

The record, in a justice's court, usually contains the names of the parties, and short notes of the date and description of the process and time of issuing; the name of the officer to whom the process is delivered, and the time and manner of service; the appearance of the parties, the nature and amount of the plaintiff's cause of action, the defence of the defendant, the continuances, the trial and finding of the justice or jury, and the rendering of judgment, together with all intermediate process and proceedings material and necessary in prosecuting or defending the suit: and the entry of the proceedings should be made in the order of time in which they transpired. These notes or memoranda are to be entered in a docket book to be kept by the justice of the peace for that purpose. *Gale's Stat.*, 402.

As the process and papers in suits before justices of the peace are liable to accident and loss, it is important that care and particularity should be observed in entering in the record all the facts necessary to show the jurisdiction of the justice in the first instance, as well as the regularity of the proceedings to the time of entering final judgment.

The judgment, though pronounced or awarded by the justice, is not his determination or sentence, but the determination or sentence of the law. It is the conclusion that naturally and regularly follows from the premises of law and fact; which judgment or conclusion depends not on the arbitrary caprice of the justice, but on settled and invariable principles of justice. The judgment, in short, is the remedy prescribed by law for the redress of injuries, and the suit or action is the vehicle or means of administering it. 3 *Bl. Com.*, 396.

There are various ways, however, in which a suit may be determined as to some or all of the defendants, or as to a part of the cause or causes of action, before it shall have progressed to a hearing or trial on the merits and final judgment.

By discontinuance; which is a mere suspension of the proceedings without affecting the merits of the action.

Discontinuance is where the opportunity of prosecution is lost for that time, or the plaintiff is dimissed the court. And every suit ought to be properly continued from its commencement to its conclusion; and the suffering any default, is called a discontinuance. *Jac. Law Dic.*, (*tit. Discontinuance of Process.*)

A continuance of a cause not authorized by the statute, would be a discontinuance of the suit, and the defendant is no longer bound to attend. 3 *Bl. Com.*, 296. The irregularity, however, would be cured by the appearance of the party on the day to which the cause is continued, and going to trial.

Discontinuance of process is helped, at common law, by appearance; and then all discontinuances, miscontinuances, and negligence in the suit, either of the plaintiff or defendant, are cured after verdict. *Jac. Law Dic.*, (*tit. Discontinuance of Process.*) 9 *Johns. Rep.*, 136.

When the plaintiff or his agent does not appear on the return of the process, without any sufficient reason being assigned, the justice shall dismiss the suit, and the plaintiff shall pay costs. *Gale's Stat.*, 404, § 6. This section, however, does not require the dismissal of a suit on a note placed in the hands of a justice for collection. And when a plaintiff does not appear at the time to which a cause has been continued, judgment of discontinuance may be entered against him. 2 *Wend. Rep.*, 260.

When a cause has been discontinued before a justice by the *laches* of the plaintiff, the justice has no jurisdiction; and if

he proceeds in it, his proceedings are *coram non judice* and void. 6 *Cowen's Rep.*, 661.

Judgment of discontinuance is not a bar to a second action for the same cause. 2 *Johns. Rep.*, 409. 1 *Scam. Rep.*, 152.

By nonsuit: which is letting a suit or action fall, or a renunciation of it by the plaintiff, most commonly upon the discovery of some error or defect after he has stated his case or closed his evidence, or after the defendant has closed his case, and before the matter is submitted to the justice, when tried before him without a jury, or before the jury have delivered their verdict. *Jac. Law Dic.*, (*tit. Nonsuit.*)

According to the old books, the terms "discontinuance" and "nonsuit" are frequently used as having the same import; but, in modern times, it has been held that a nonsuit can only be at the instance of the defendant, which doctrine has completely distinguished the terms. 1 *Saund.*, 195, *d*, *note* (*f.*)

Yet it has been held, where a plaintiff does not appear within a reasonable time after the return of the process, the justice may proceed to call and give judgment of nonsuit against him, if he then fails to appear. 20 *Johns. Rep.*, 309. 1 *Saund.*, 195, *d*, *note* (*f.*)

The dismissal of a suit by a justice of the peace is, in effect, a nonsuit, and does not bar a subsequent suit for the same demand, or for a different cause of action. 1 *Scam. Rep.*, 152.

If any suit shall be commenced by a non-resident without filing a bond for costs, the suit shall be discontinued on the motion of the defendant, and the plaintiff shall be liable to pay all costs occasioned thereby, which may be recovered before any justice of the county in the name of the party injured. *Gale's Stat.*, 421, § 8.

In a suit where the defendant does not appear and make a defence, the plaintiff may be nonsuited for a variance. 3 *Taunt. Rep.*, 81.

Where a man brings a personal action, and doth not prosecute it with effect; or if, upon the trial, he refuses to stand the verdict, then he becomes nonsuited; as on a trial when the jury come to deliver the verdict, and the plaintiff is called upon to hear the verdict, if he does not appear after being thrice called, he is nonsuited upon the motion of the defendant, and the nonsuit is thereupon recorded by the justice in his docket book, or book containing an abstract of the proceedings. 3 *Bl. Com.*, 376. *Jac. Law Dic.*, (*tit. Nonsuit.*)

On the trial of a cause, either with or without a jury, the justice may nonsuit the plaintiff when, in his opinion, the testimony offered does not support the action. 12 *Johns. Rep.*, 299. 2 *Scam. Rep.*, 535.

As when the plaintiff's demand is a note of hand, and the

defendant makes oath that the signature is not his; if the plaintiff should fail to prove the signature to be the defendant's, the justice might properly nonsuit him.

When the evidence tends to prove the issue, the jury should be left to determine the cause under the evidence offered. In such a case, the court has no power to take the cause from them, or to advise them that the defendant is entitled to their verdict. 1 *Scam. Rep.*, 406.

According to the practice in the English courts, it appears to be optional with the plaintiff whether he will be nonsuited or not, and he cannot be compelled to be so, but may insist upon the cause going to the jury, and thus take his chance of the verdict. 1 *Saund.*, 195, *d*, *note* (*f.*) 1 *B. & A.*, 252.

In this state, however, if a party fails to introduce some necessary link in the chain of testimony to make out his case, and such failure is evidently the result of oversight, the proper course for the defendant is to apply for a nonsuit; and then it is matter of discretion with the court trying the case, to permit the plaintiff to introduce further evidence, if he can, to supply the defective link. If the party cannot supply the defect, the nonsuit is granted as a matter of course; but the party, by his *laches*, does not lose his debt. 2 *Scam. Rep.*, 248.

But there is no authority for the court to instruct the jury either to nonsuit the plaintiff, or to find against him as in case of nonsuit, when there is no evidence proving or tending to prove the issues on the part of the plaintiff. 4 *Scam. Rep.*, 447.

After a cause is once submitted to a jury, the justice cannot withdraw it from them, and nonsuit the plaintiff. 3 *Johns. Rep.*, 430.

But the plaintiff may himself submit to a nonsuit at any time before the jury render their verdict. 2 *Scam. Rep.*, 261. 10 *Wend. Rep.*, 519.

When a cause is tried before a justice without a jury, the plaintiff may elect to become nonsuited at any time before it is finally submitted for the judgment of the court; but, after it is so submitted and under advisement, it is presumed that he cannot become nonsuited. 11 *Johns. Rep.*, 457.

After a nonsuit, which is only a default, the plaintiff may commence suit again for the same cause of action. 3 *Bl. Com.*, 376. He does not thereby lose his debt. 2 *Scam. Rep.*, 250.

By nolle prosequi; which is a partial forbearance by the plaintiff to proceed any further, either as to some of the defendants, or the whole, or to some part of the suit; but still he is at liberty to go on as to the rest. It is no bar to a future action for the same cause, except in those cases, indeed, where, from the nature of the action, judgment and execution against one is a satisfaction of all the damages sustained by the plaintiff. 1 *Saund.*, 207, (2.)

In actions founded upon a *tort*, such as trover or trespass, the plaintiff may enter a *nolle prosequi* as to some of the defendants, and proceed against the others at any time before final judgment, even although they all join in the same plea and be found jointly guilty; 1 *Ld. Raym.*, 597. 3 *Salk. Rep.*, 244; and he may do so when the defendants plead severally. 2 *Salk. Rep.*, 457. Where a plaintiff enters a *nolle prosequi* against one of several defendants in *tort*, he thereby admits that there is no joint *tort* as far as regards that defendant, and it would be a bar to any further suit for the same cause. 1 *Saund.*, 207, *notes* (2.) *and* (*n.*)

If an action is brought upon a contract against several defendants, who join in their pleas, and a verdict is found against them, it is apprehended the plaintiff cannot enter a *nolle prosequi* against any of them, because, the contract being joint, the plaintiff is compelled to bring his action against all the parties thereto, and he shall not, by entering a *nolle prosequi*, prevent the defendant, against whom the recovery has been had, from calling upon the other defendants for a ratable contribution. 1 *Scam. Rep.*, 552.

In actions upon contract, when a joint contract must be proved, judgment must be rendered against all who are served with process, or none; 2 *Scam. Rep.*, 36; unless one or more of the defendants interpose a defence which is personal to himself, such as infancy, bankruptcy, or the like. 2 *Scam. Rep.*, 571.

And in such causes the plaintiff may, either before or after verdict, enter a *nolle prosequi* as to the defendant interposing such defence, and take judgment against the rest. 1 *Chit. Pl.*, 599.

According to the older causes it seems that, by entering a *nolle prosequi* the plaintiff thereby voluntarily acknowledged that he had no cause of action, and it was a bar to another suit. At the present day, however, it is considered as merely an agreement not to proceed any further in the suit, and would be no bar to a fresh action for the same cause. 1 *Saund.*, 207, (2.)

Accordingly, if the plaintiff misconceive his action, or make a mistake as to the party sued, (as where he sues a feme covert, and she pleads coverture in bar; 3 *Term Rep.*, 511; or when he discovers that the defendant is an infant, and the action is upon an account stated for necessaries or the like,) he may enter a *nolle prosequi* as to the whole cause of action. 2 *Archb. Pr.*, 248. 1 *Term Rep.*, 40.

Where in trespass the plaintiff declares that the defendant took and carried away the plaintiff's hay, grass, and corn, he may enter a *nolle prosequi* as to the hay and grass, and proceed for the taking of the corn. *Doug.*, 196.

If the plaintiff bring suit upon two separate and distinct demands, and the defence set up by the defendant should be a

complete bar to one of them, the plaintiff may enter a *nolle prosequi* as to the demand to which the defence is a bar, and proceed upon the other. 1 *Saund.*, 207, *c.*

By retraxit; which is similar to a *nolle prosequi* to the whole declaration, excepting that the former is a bar to any future action for the same cause, the latter is not. The former can only be made in person, 1 *Bac. Ab.*, 299, in open court; the latter may be by attorney.

The plaintiff may appear in open court and renounce his suit, and this is as complete and effectual a bar as if a verdict had been rendered for the defendant, and he can never afterwards commence another action for the same cause. 10 *Johns. Rep.*, 220. 6 *Cowen's Rep.*, 385. A *retraxit* is an open and voluntary renunciation by the plaintiff of his suit in court, and by this he forever loses his action. 3 *Bl. Com.*, 296.

It operates as a release or discharge of the action, and an absolute bar to any further action for the same cause. 1 *Saund.*, 207, (2.)

Again, judgments are either interlocutory or final:

Interlocutory judgments are such as are given on some plea or proceeding which is only intermediate, and do not finally determine or complete the suit. Of this nature are all judgments for the plaintiff upon demurrer to pleas in abatement of the suit or action, in which it is considered by the court that the defendant do answer over, that is, put in a more substantial plea. It is easy to observe that the judgment here given is not final, but merely interlocutory; for there are afterwards farther proceedings to be had when the defendant hath put in a better answer. 3 *Bl. Com.*, 396.

Upon demurrer to a plea in abatement or to a replication thereto, if the same be determined against the defendant, the justice should permit the defendant to plead over.

Final judgments are such as put an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for. 3 *Bl. Com.*, 328. It puts an end to all demands of the plaintiff which do not exceed the jurisdiction of the justice of the peace and are of such a nature as may be consolidated, and also to all like demands of the defendant which might be set off. *Gale's Stat.*, 406, § 16.

Gale's Stat., 407. "SEC. 20. In all cases the parties to a suit before a justice shall have the privilege of referring the difference between them to arbitrators, mutually chosen by them, who shall examine the matter in controversy, and make out their award thereon in writing, and deliver the same to the justice, who shall enter the said award on his docket, and give judgment according thereto."

In case of a hearing on the part of the plaintiff, when it may be had on the defendant's failing to appear, the justice shall proceed to hear and determine the cause in the absence

of the defendant, but shall not give judgment in favor of the plaintiff, unless the plaintiff shall fully prove his demands in the same manner as if the defendant had been present and denied the same. *Gale's Stat.*, 404, § 5, *and page* 76, § 4.

Gale's Stat., 404. "SEC. 7. If two or more persons shall be sued jointly, before any justice of the peace, and all of such defendants shall have had notice as aforesaid, by warrant or summons, the appearance of any one of the said defendants, at the time of trial, shall be sufficient to justify the said justice in proceeding as if all were present; and if none of said defendants shall appear after such notice, the justice shall, if the plaintiff's demand be established as aforesaid, proceed as in other cases of default; and in either of the aforesaid cases, the justice shall not divide the amount of the debt proved among the defendants, but shall give one entire judgment for the whole amount proved to be due against so many of the defendants jointly, as shall be proved to be jointly indebted to the plaintiff. But if it shall appear to the justice, that any two or more of the defendants are severally indebted to the plaintiff, upon separate and different debts, or causes of action, or upon several or different promises or contracts, such plaintiff shall not be allowed to prosecute his suit against such defendants jointly. When there are several joint debtors and all cannot be served with process, the justice may render judgment against such as are served with process."

Gale' Stat., 405. "SEC. 9. When the parties shall appear and be ready for trial, the justice shall proceed to hear and examine their respective allegations and proofs, and shall thereon give judgment against the party who shall be proved to be indebted to the other, for so much money in dollars and cents as shall appear to be due, with costs of suit; but if neither party shall appear to be indebted to the other, then the judgment shall be against the plaintiff for the costs of suit only; and if such judgment be rendered upon any note or bond, or for the balance due upon a settled account, the justice shall allow interest from the time when the same became due, and include the same in the said judgment; and in all cases the judgment shall bear interest at the rate of six per cent. per annum until paid."

If a cause has been tried before a justice and a jury, upon the verdict being delivered to the justice and by him entered in his docket, he shall proceed and render judgment thereon according to the finding thereof. *Gale's Stat.*, 407.

A justice of the peace has no authority to render judgment against one of two defendants who is not served with process, although the other defendant is regularly served. 1 *Scam. Rep.*, 590.

In suits commenced by attachment, when the defendant has not been personally served with process and no appear-

ance has been entered, judgment shall only authorize a sale of the property levied upon and proceedings against garnishees to collect the amount thereof. *Gale's Stat.*, 77, § 10.

When suit is commenced by attachment, and the defendant has been personally served with process, or shall have appeared to the action, judgment shall have the same force and effect as judgment obtained upon a summons; but the property attached shall be sold before any execution shall be issued upon such judgment, and, if such property shall not sell for a sum sufficient to pay the judgment and costs, execution may issue to collect the balance. § 9.

When a garnishee shall fail to appear pursuant to the summons, the justice shall enter judgment against him for the amount of the judgment obtained against the defendant in attachment, and execution shall be issued thereon as in other cases. *Gale's Stat.*, 77, § 7.

After a hearing, when any garnishee shall appear, the justice shall give judgment in the premises according to the right and justice of the cause, and issue execution as in other cases. § 8.

Every judgment ought to be complete and formal, and, in personal actions before a justice of the peace, the award of debt or damages, either for the plaintiff or defendant, must be for a sum certain in dollars and cents, for, if it is for an uncertain amount, judgment rendered thereon would be void.

A verdict, however, for a specific sum with interest from a certain time at a particular rate, might be sufficient, particularly if the justice calculate the interest, and the calculation be submitted to, and approved by, the jury. 1 *Cowen's Rep.*, 115.

If a verdict is imperfect, judgment cannot be given upon it; and, for the uncertainty of the verdict, a judgment may be void. *Jac. Law Dic.*, (*tit. Judgment.*)

Justices of the peace who shall have given bond and received commissions pursuant to the statute, are authorized and empowered and it is made their duty to receive money on all notes and demands which may have been placed in their hands for suit or collection; and also upon all judgments rendered by them prior to the issuing execution thereon. *Gale's Stat.*, 423, § 5.

On the return of all executions, the constable shall pay over to the justice of the peace who issued the same, all money not previously paid over to the plaintiff; and also all witness's fees which remain unpaid to any witness. *Sess. Laws of* 1841, *page* 177.

2. OF COSTS.

At common law, neither the plaintiff nor the defendant was entitled to costs *eo nomine*. 2 *Inst.*, 288. In all actions,

however, in which damages were recoverable, the plaintiff, if he had a verdict, was in effect allowed his costs, for the jury always computed them in, and as a part of, the damages. 3 *Bl. Com.*, 399.

Costs can only be recovered in suits before justices of the peace in cases where they are expressly given by statute.

Upon the continuance of a cause, the party praying such continuance shall pay all the costs occasioned thereby.

Where a suit shall be dismissed for the non-appearance of the plaintiff or his agent at the time appointed for the trial, the plaintiff shall pay costs.

When a suit is tried before a justice, he shall give judgment against the party who shall be proved to be indebted to the other, for so much money in dollars and cents as shall appear to be due, with costs of suit.

If neither party shall appear to be indebted to the other, then judgment shall be against the plaintiff for the costs of suit only.

For services rendered the following fees are allowed by the statute. *Gale's Stat.*, 297.

To the justice.

	$ cts.
For every warrant, summons, or subpœna, each subpœna to contain the names of four witnesses, if so many are required by the same party,	18¾
For every continuance,	12½
Administering an oath,	6¼
Issuing *dedimus* to take depositions,	25
For taking each deposition when required, for every seventy-two words,	12½
Entering judgment,	25
Issuing execution,	25
Entering security on docket,	25
Scire facias to be served on security,	25
Notification to each referee,	25
Entering the award of referees,	37
Entering appeal from justice's judgment,	25
For each transcript of the judgment and proceedings before the justice on appeal,	25
Issuing process of attachment and taking bond and security,	75
Entering judgment on the same,	25
Docketing each suit,	12½
Taking the acknowledgment or proof of a deed or other instrument of writing,	25
For each precept on forcible entry and detainer,	50
On trial per day,	2 00
Making complete copy of proceedings thereon,	2 00
For each jury warrant,	25

	$ cts.
For each marriage ceremony performed, - -	1 00
For each certificate thereof, - - - - - -	25
For administering the oath to the finder or taker up in cases of estrays, &c., making an entry thereof with the report of the appraisers, and making and transmitting a certificate thereof to the clerk of the county commissioners' court, - - - -	50

To the constable.

Serving and returning each warrant or summons, - -	25
Serving and returning each subpœna, - - -	12½
Serving and returning execution, - - - -	50
Advertising property for sale, - - - - -	25
Commission on sales not exceeding ten dollars, ten per centum; on all sales exceeding that sum, six per centum.	
Attending trial before a justice in each jury cause, - -	25
Serving jury warrant in each case, - - - -	50
Each days attendance on the circuit court when required, to be paid out of the county treasury, - -	1 00
Mileage, when serving a warrant, summons, or subpœna, from the justices office to the residence of the defendant or witness, per mile, - - -	5
For serving warrant on appraisers in cases of estrays, &c., - - - - - - - - -	25

To jurors.

To each juror sworn in a civil case, before a justice of the peace, - - - - - - - -	25

To arbitrators.

For every arbitrator or referee, for each day he shall be necessarily employed in making up his award in cases before justices of the peace, - -	1 00

To witnesses.

Each witness, summoned to attend a trial before a justice of the peace, shall be entitled to fifty cents, for attending on each trial, to be taxed with the costs of suit and paid when the debt and costs are collected; but, if more than two witnesses shall be sworn in any case, to testify to one fact on the same side, the party, requiring such extra witness, shall be at the whole expense of procuring the same; but no such fee shall be taxed by the justice, unless claimed by the witness attending. *Gale's Stat.*, 406, § 18.

According to the English law, no witness is bound to appear except his regular fees be tendered to him at the time of serving the subpœna; nor, if he appear, is he bound to give evidence, till such fees are actually paid or tendered; 13 *East.*, 16. 1 *Bl. R.*, 36; and, if a man who is not subpœnaed happens to be in court during a trial, he shall not be forced to be sworn against his will; but, if he consents, the want of a subpœna is not material. 2 *Bac. Ab.*, 594.

The costs for which judgment is given, are the costs which the prevailing party is entitled to recover according to the statute, taking no notice of the costs of the losing party; therefore, in making up judgment for the costs, the justice should include only the costs made by the party in whose favor the judgment is rendered.

If costs made by the losing party should be included in the judgment, it would be error. 1 *Cowen's Rep.*, 111. 15 *Johns. Rep.*, 195.

When the parties themselves settle a suit, without making any agreement respecting the costs, each party must bear his own. Each party is supposed to advance the costs as the suit proceeds. 1 *Caine's Rep.*, 66. 5 *Johns. Rep.*, 268.

Costs are considered, in a legal sense, as parcel of the damages; 9 *East.*, 298; and are so much an incident of the judgment, that it is a general rule that, in order to recover them, they must be awarded and incorporated in the final judgment. 10 *Coke's Rep.*, 115.

It is presumed that the justice may enter into the judgment prospective costs for one execution, which must be deducted if the judgment is paid before the execution is issued.

On the return of all executions, the constable shall pay over to the justice of the peace who issued the same, all money not previously paid over to the plaintiff; and also, all witness's fees, which remain unpaid to any witness; and it shall be the duty of the justice of the peace to post up in his office, at least once in three months, a list of all witness's fees in his hands, and the name of the person to whom they belong; and for a failure to comply with this provision, a justice of the peace shall be liable to a fine of fifty dollars, to be recovered by action of debt in the name and behalf of the county commissioners' court. *Sess. Laws of* 1841, *p.* 177.

To entitle a constable to his commission on an execution, he must levy the money, except when he is prevented by the act of the party in whose favor it was issued, or by operation of law. 2 *Cowen's Rep.*, 421. If the constable levy upon property of the defendant sufficient to satisfy the execution, but, before sale, the parties settle, the constable would be entitled to his commission. 1 *Cowen's Rep.*, 192. 5 *Term. Rep.*, 470. And it seems that he would be entitled to his full commission upon arresting a defendant upon a *ca. sa.*, although the defendant should be discharged by the act of the plaintiff or

by operation of law. 5 *Johns. Rep.*, 252. But, where he has not actually served the execution by a levy or arrest, and a compromise or payment is made between the parties, of which he has notice, of course nothing is due to him, for he has done nothing officially.

But whenever the plaintiff interposes, and a compromise takes place after levy made, the constable is entitled to poundage on the sum realized by the plaintiff, or that might have been collected from the property levied on. *Breese Rep., App*, 22. 1 *Caines Rep.*, 192. By the act of levying on property, the constable has incurred all the risk and responsibility for the safe keeping of the property, and it ought not to be in the power of the parties to deprive him of compensation for it. If, therefore, the plaintiff settles the judgment, or in any way releases the property from the levy, he would be liable to the constable for his fees and commission. 17 *Wend. Rep.*, 14.

3. OF FILING TRANSCRIPTS.

A transcript is a copy of the original entries made by the justice of the title of the cause, of the process, proceedings, and judgment in his docket.

Gale's Stat., 409. "SEC. 29. When it shall appear by the return of the execution first issued, that the defendant has not personal property sufficient to satisfy the debt and costs within the county, in which judgment was rendered, and it is desired by the plaintiff to have the same levied on real property, in that, or any other county, it shall be lawful for the justice to certify, to the clerk of the circuit court of the county in which such judgment was rendered, a transcript, which shall be filed by said clerk, and the judgment shall thenceforward have all the effect of a judgment of the said circuit court, and execution shall issue thereon, out of that court as in other cases."

The real property of the defendant shall be bound for the payment of such judgment from the date of the filing of a transcript of the judgment in the clerk's office. *Gale's Stat.*, 413, § 52.

The judgment, of which a transcript has been filed in the clerk's office, is a lien upon all the lands of the defendant in the county wherein the judgment was rendered and the transcript has been filed; but it creates no lien beyond the limits of such county. 1 *Scam. Rep.*, 235.

After a transcript has been filed in the office of the clerk of the circuit court, execution issues from the clerk's office like its other process, and all control over it properly belongs to that court, and the power of the justice who rendered judgment is entirely at an end. Payment, therefore, made to him would not be sufficient.

CHAPTER X.

OF EXECUTIONS—OF INQUESTS, &c., AND TRIAL OF THE RIGHT OF PROPERTY—OF GARNISHMENT—OF THE LIABILITY OF CONSTABLES AND THEIR SECURITIES—AND OF EXECUTIONS ISSUED BY THE CLERK OF THE CIRCUIT COURT.

I. Of executions.
II. Of inquests, &c., and trial of the right of property.
    1. Of inquest of office.
    2. Of the trial of the right of property.
III. Of garnishment.
IV. Of the liability of constables and their securities.
V. Of executions issued by the clerk of the circuit court.

I. OF EXECUTIONS.

When judgment has been rendered in a cause, and it shall not have been removed into the circuit court by appeal or writ of *certiorari*, the next step is the *execution* of that judgment, or putting the sentence of the law in force.

Executions which may be issued by a justice of the peace are either,

First. Against the goods and chattels of the defendant; or,

Second. Against his body.

1. *Of executions against the goods and chattels.*

This is a judicial writ, and was allowed by the common law where judgment was had for debt or damages against any man. 2 *Inst.*, 394. Now, by the statute, it is provided that a party in whose favor judgment shall be rendered, may have execution to collect the amount thereof, by which execution the constable is commanded to levy the debt, or damages and costs, of the goods and chattels of the defendant which may be found in his county. *Gale's Stat.*, 408, § 27.

In treating of this writ, it will be considered in the following manner:

1. Of the time when, and by whom, it may be issued.
2. Of its form, and when returnable.
3. Of issuing further executions.
4. Of proceedings of constables thereon.

1. *Of the time when, and by whom, executions may be issued.* *Gale's Stat.*, 408. "Sec. 26. No execution shall be issued by a justice of the peace, until after the expiration of twenty days from the date of the judgment, on which such execution

is to be issued, unless the party applying for the same, or the agent of such party, shall make oath that he believes that the debt will be lost, unless execution be issued forthwith. If such oath be made, then the execution shall be issued immediately, and levied, but no sale of any property, under such execution shall take place within twenty days from the date of the judgment; nor shall the issuing of such execution deprive either party of the right to appeal."

Upon the rendition of judgment against a sheriff, coroner, or other officer and his securities, where the officer fails to pay over money collected by him, on demand, execution, when application is made by the plaintiff, or his or her agent or attorney, shall issue forthwith against such sheriff or other officer and his securities, as in other cases. *Gale's Stat.*, 427.

An execution must be sued out within a year and a day after the judgment is entered, otherwise the court concludes *prima facie* that the judgment is satisfied and extinct; 2 *Saund.*, 6; yet the plaintiff may still bring an action of debt, founded on this dormant judgment, which was the only method of revival allowed by the common law. 3 *Bl. Com.*, 421.

If the plaintiff have judgment with stay of execution, he must take out execution within a year and a day after the stay is determined; 6 *Mod. Rep.*, 288; and where execution has been delayed for a year, att he request of the defendant and for his benefit, the reason of the rule does not apply. 19 *Johns. Rep.*, 173. And it appears that, where the defendant appeals, or removes the case by *certiorari*, and thereby hinders the plaintiff from taking out execution within the year, and the appeal is dismissed, and the judgment thereby affirmed, or the writ of *certiorari* abated or discontinued, the plaintiff may take out execution after the year, because the appeal or *certiorari* was a *supersedeas* to the execution, and the plaintiff must wait till it be determined. The time he has been obliged to wait is not computed as a part of the year. 2 *Cowen's Rep.*, 503. 9 *Johns. Rep.*, 66.

An execution issued from a court of general jurisdiction after a year and a day, without a revival of the judgment, is not void, but voidable. The court has control over its process, and if an execution should be issued upon a judgment which has been executed, or in any way discharged, the defendant might show this or any other reason why he should not be disturbed, and the court would avoid or set aside the execution. 5 *Johns. Rep.*, 100. 2 *Saund.*, 6, *a*. But justices of the peace are not invested with this authority. They cannot by rule of court set aside or annul an execution which has been delivered to an officer. The reason, therefore, why executions issued by courts of general jurisdiction are held to be voidable at the instance of the party against whom issued, does not apply to those issued by a justice of the peace.

All executions are to be issued by the justice of the peace who rendered the judgment while he continues in office.

Sess. Laws, 1838–9, *p.* 41. It is provided by this act, "That justices of the peace, to whom the dockets and papers of other justices have been, or may hereafter be, transferred or delivered, because of the resignation, removal, death, or expiration of the term of service of the justice whose dockets and papers have been or may be transferred as aforesaid, shall be authorized to issue executions upon all judgments remaining unsatisfied upon such dockets, and proceed in the collection thereof as though such judgments had been rendered by the justice having possession of such docket and papers."

2. *Of the form of execution, and when returnable.* The execution being founded on the judgment, must, of course, conform to, and be warranted by, it. 2 *Saund.*, 72, *i.* Hence, where there are a number of parties, it must be in the name of all the plaintiffs and against all the defendants against whom judgment is rendered. 5 *Bac. Ab.*, 165. Although the execution on a joint judgment must be joint, yet it may be levied upon the property of one only, and he may have contribution against the others; 5 *Term. Rep.*, 556; or it may be levied upon the joint property of all or any number of the defendants.

The execution should issue for the collection of the debt, or damages and costs, for which judgment is rendered by the justice, and the constable should be directed to collect the amount which the party for whom the execution issues lately recovered before the justice against the opposite party.

It must run in the name of "The people of the state of Illinois," *State Const., Art. IV.* § 7, and be directed to any constable of the county in which the judgment was rendered.

Every execution issued by a justice of the peace should be dated on the day on which it issues, and must be made returnable to the justice issuing the same within seventy days from the date thereof. *Gale's Stat.*, 408, § 27. After the expiration of seventy days from the date of the execution, it is officially dead, and the constable can take no further proceedings under it. *Breese Rep.*, 290.

3. *Of the issuing of further executions.* It is said that a man can have but one execution; it must, however, be intended an execution with satisfaction. *Jac. Law Dic.*, (*tit. Execution.*)

At common law, if an execution against the goods and chattels had been issued within a year and a day after entering judgment and remained unexecuted, a second execution might issue at any time within twenty years. 2 *Scam. Rep.*, 441. 2 *Saund.*, 72, *b.* So where a part of the debt or damages has been levied upon the first execution, another may be issued for the residue thereof. *Jac. Law Dic.*, (*tit. Execution.*) Where an execution is returned without being satisfied in whole or in

part, it is customary for the justice to issue a further execution for the amount not collected; and this practice appears to be sanctioned by the decision of the supreme court in the case of Garner *v.* Willis. *Breese Rep.*, 290.

It is provided by the statute that "When it shall appear by the return of any execution issued as aforesaid, that the defendant has not personal property within the county, sufficient to satisfy the debt, and it is desired by the plaintiff, to have execution issued to some other county in which it is alleged that the defendant has personal property, the justice shall issue execution, directed to any constable of the county, where such property shall be said to be, to which execution shall be attached an official certificate of the [clerk of the county commissioners' court, *Sess. Laws of* 1839-40, *p.* 64] of the county in which the same shall be issued, setting forth, under the seal of the said court, that such justice so issuing, was at the time of issuing of said execution, a justice of the peace, in and for said county; and no constable shall be bound to execute any such process unless so authenticated." *Gale's Stat.*, 409, § 28.

If all the money is not levied on the first execution, it must be returned before another can be issued, because it is grounded on the first writ by reciting that all the money was not levied. 1 *Salk.*, 313. Where a constable levies upon goods and does not return the execution, and another is issued to collect the money, the defendant may plead this matter. *Jac. Law Dic.*, (*tit. Fieri Facias.*) And it seems that it would be irregular in any case to issue a second execution before the return of the first. 5 *Cowen's Rep.*, 417. If the first execution be lost, the party should resort to his action upon the judgment.

4. *Of the proceedings of constables on executions.* On the receipt of an execution by a constable, it is his duty to proceed to collect the sum thereby directed to be levied of the goods and chattels of the person against whom the execution is issued, and for that purpose to enquire and make reasonable search for his goods, &c.

By "goods and chattels," as used in the statute in reference to executions issued by a justice of the peace, it is presumed is meant chattels personal as distinguished from chattels real. 2 *Bl. Com.*, 386. Therefore, leasehold property, or a term for years in land, which is a chattel real, and may be sold by a sheriff as personal property, it is presumed cannot be sold by a constable on an execution issued by a justice of the peace. 19 *Johns. Rep.*, 73. *Law of Fixtures, by Ames & Ferand*, 361, *note* (*a.*) Chattels personal are, properly and strictly speaking, things moveable, which may be annexed to or attendant on the person of the owner and carried about with him. 2 *Bl. Com.*, 387.

Ordinarily, things attached to real property, which, when separated therefrom, are personal chattels, become, when thus attached, a part of the real property, and cannot, therefore, be

sold as personal chattels. 17 *Johns. Rep.*, 116. 5 *Cowen's Rep.*, 323. But to this rule there are various exceptions. Thus grain, and other kinds of crops which are raised yearly by sowing and planting, are, even while growing, considered as personal chattels, and may be sold on execution as such. 2 *Johns. Rep.*, 418. 9 *Johns. Rep.*, 108. But grass while growing, and fruit not gathered, are a part of the freehold, and cannot be held as personal chattels. *Toller's Law of Ex'rs.*, 192. But when severed they become personal property and may be levied upon as such. *Toller's Law of Ex'rs.*, 149. A purchase, under an execution, of corn or other emblements growing, carries with it, to the purchaser, the right to go upon the land to cut and carry away the crop. 9 *Johns. Rep.*, 108.

Fruit trees are part and parcel of the freehold, and can in no sense be considered as goods and chattels. *Breese Rep.*, 221. It has, however, been held that a nurseryman, who is a tenant of land, may remove from the land his hot-houses and green-houses which he has erected, and the trees growing. 2 *East Rep.*, 88.

The principal difficulty in determining what shall be considered as personal chattels, and therefore liable to be sold by a constable on execution as such, is in relation to what are termed fixtures, or personal chattels annexed to real property. Whether they shall be considered as personal chattels, would seem to depend in some measure upon the character in which the person in possession of real property holds it, whether as owner or tenant. So, also, in determining questions respecting the right to fixtures, the nature of the thing affixed, the intention of the parties in making the annexation, and the purpose and object for which the article has been put up, have been considered.

A cider mill and press erected by a tenant holding from year to year, at his own expense and for his own use in making the cider on the farm, are not fixtures, but personal property belonging to the tenant, who may remove them at the expiration of the tenancy. 20 *Johns. Rep.*, 29. So are copper stills, kettles, steam-tubs, coolers, &c., erected by a tenant for the purpose of carrying on the business of distilling, though fixed to the building. 5 *Cowen's Rep.*, 323. So is a kettle for dying fixed to the brick-work of a fulling-mill. 15 *Mass. Rep.*, 159. It has been held that machinery for spinning flax and tow, and carding machines used in a manufactory, and which are attached to the building by an upright board resting on the frames and fastened to the ceiling, and by cleets nailed to the floor round the feet of the frames, but the machines or frames, themselves, not nailed to the building, are personal property. 17 *Johns. Rep.*, 116. And so are erections made by a tenant for the purposes of ornament, as marble chimney-pieces, pier-glasses, hangings, wainscott fixed only by screws, and the like. 3 *East*, 53.

In order to constitute any building put up by the tenant a fixture, irremovable by him, though it relate to agriculture, it must be fixed to the inheritance in some way. Accordingly, it has been held that a barn put upon pattens, or blocks of timber, but not fixed in or to the ground, is removeable. *Bull. N. P.*, 34. 3 *East Rep.*, 55. So in respect of a stable on rollers. 1 *Hen. Bl.* 259. It appears from these cases that, to constitute a fixture, there must be a complete annexation to the soil. 2 *Kent's Com.*, 343–4.

This doctrine has undergone a very full examination in the supreme court of the United States in the case of Van Ness *v.* Pacard. 2 *Peters' Rep.*, 137. Mr. Justice Story, in delivering the opinion of the court, says: "It has been suggested at the bar, that the exception in favor of trade has never been applied to cases like that before the court, where a large house has been built, and used in part as a family residence. But the question whether removable or not does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole question is whether it is designed for purposes of trade or not. A tenant may erect a large as well as a small messuage, or a soap-boilery of one or two stories high and on whatever foundations he may choose." And it was held that the tenant was not liable in an action of waste for pulling down and removing a wooden dwelling house, with a cellar of stone or brick foundation and a brick chimney, which he had erected upon the demised lot of ground for a term of years, reserving rent with a view of carrying on the business of a dairy-man, and for the residence of his family and servants engaged in the business.

But if a person erect buildings on the land of another voluntarily, and without any contract, he may not remove them. 16 *Mass. Rep.*, 241. Yet, where a father permitted his son to build a house on his land for the accommodation of the son, it was held that the house was the personal property of the son. 4 *Mass. Rep.*, 514.

The strict rule as to fixtures that applies between heir and executor, applies equally between vendor and vendee; and fixtures erected by the vendor, for the purpose of trade and manufactures, as potash kettles for the manufacturing of ashes, pass to the vendee of the land. 2 *Kent's Com.*, 346.

A tenant must remove fixtures put up by him before he quits the possession on the expiration of the lease. If not removed during the term, they become the property of the landlord. 6 *Cowen's Rep.*, 665.

Trees, mill-stones, grass, &c., sold by the owner of the land to the defendant, although they have not been actually severed from the freehold, are considered in law the personal property of the vendee, and may be taken on execution. 11 *East Rep.*, 36. 3 *Day's Rep.*, 476.

Money, and every thing of a tangible nature belonging to the defendant, may be taken in execution; 12 *Johns. Rep.*, 220, 395; but the constable cannot take common promissory notes, bills of exchange, or other choses in action; 1 *Cowen's Rep.*, 240; nor bank shares, or shares in a public library. 9 *Johns. Rep.*, 96.

The constable cannot take goods pawned, pledged, or gaged for debt, nor goods demised or let for years, nor goods distrained or taken, and in the custody of the sheriff or any constable upon a former execution, for these are in the custody of the law; *Shower's Rep.*, 173; and goods in the custody of the law are not even distrainable for taxes, as being in the possession of the party. 17 *Johns. Rep.*, 128. 20 *Wend. Rep.*, 41.

And money belonging to the defendant, which the same or another constable has levied or raised on an execution in favor of the defendant against another, cannot be retained or levied on by him: such money never having been paid over to the defendant, has not become his specific property, and the same money is not necessarily to be paid to him. 6 *Cowen's Rep.*, 494. 1 *Cranch Rep.*, 117.

The mortgagor of a chattel having the right of possession for a definite period, has an interest which may be sold by execution. The purchaser acquires the right of possession and the absolute ownership, subject to the incumbrance. 8 *Wend. Rep.*, 339. And personal property pledged by way of mortgage, may, after forfeiture, be levied upon by virtue of an execution against the mortgagee, although it remains in the hands of the mortgagor. 9 *Wend. Rep.*, 258.

Certain personal property is exempt from execution by particular statutory provisions. By the statute of this state relative to the militia, *Gale's Stat.*, 469, it is provided, that each free white male inhabitant, resident in this state, who is or shall be of the age of eighteen and under the age of forty-five years, except those who are exempted from duty, shall be enrolled in the militia, and shall provide himself with a good musket, fuzee or rifle, with proper accoutrements. The field officers, ranking as commissioned officers shall be armed with a sword, and pair of pistols, and the company officers with a sword; and every person so enrolled, and providing himself with arms and accoutrements, required as aforesaid, shall hold the same exempt from execution, distress, or for tax. See the statute of the United States passed May 8, 1792.

Sess. Laws, 1842–3, *p.* 141. By "An act to exempt certain articles from execution," it is provided, "Sec. 1. That the wearing apparel of each and every person shall be exempt from levy or sale on execution, writ of attachment, or distress for rent.

"Sec. 2. That the following property, when owned by any person being the head of a family and residing with the same, shall be exempt from levy and sale on any execution, writ of

attachment, or distress for rent; and such articles of property shall continue so exempt while the family of such person, or any of them, are removing from one place of residence to another in this state, viz: first, necessary beds, bedsteads and bedding, the necessary utensils for cooking, necessary household furniture, not exceeding in value fifteen dollars, one pair of cards, two spinning wheels, one weaving loom and appendage, one stove and the necessary pipe therefor; *Provided*, the same shall be in use, or put up for ready use, in any house occupied by such family. Second, one milch cow and calf, two sheep for each member of the family, and the fleeces taken from the same, or the fleeces of two sheep for each member of a family which may have been purchased by any debtor not owning sheep, and the yarn and cloth that may be manufactured from the same, and sixty dollars worth of property, suited to his or her condition, or occupation in life, to be selected by the debtor. Third, necessary provisions and fuel for the use of the family for three months, and necessary food for the stock hereinbefore exempted from sale, or that may be held under the provision of this act; *Provided*, that any person, being the head of a family and residing with it, who shall be taken before a probate justice of the peace on a ca. sa. and shall take the benefit of the insolvent laws of this state, shall be allowed the same amount of property exempt from the provisions of said act as is provided for by the provisions of this act; and it shall be the duty of said probate justice of the peace to set apart to such person the same amount and kind of property as is or may hereafter be exempt from execution.

"Sec. 3. If any officer, by virtue of any execution or other process, or any other person, by any right of distress, shall take or seize any of the articles of property hereinbefore exempted from levy and sale, such officer or person shall be liable to the party injured for three times the value of the property illegally taken or seized, to be recovered by action of trespass, with costs of suit.

"Sec. 4. For the purpose of recovering the damages provided for in the third section of this act, justices of the peace shall have jurisdiction to the amount of one hundred dollars.

"Sec. 5. All laws exempting property from execution, and all acts and parts of acts coming in conflict with the provisions of this act, be and the same are hereby repealed. This act to take effect from and after its passage; *Provided*, should any disagreement arise between any officer and defendant in execution, about and concerning the value of any species of property allowed by this act, it shall be the duty of said officer forthwith to summon two disinterested house holders, who, after being duly sworn by some justice of the peace, shall proceed to appraise such property as said defendant may select.

"Sec. 6. Nothing in this act shall be so construed as to

prevent landlords from holding a lien on the crop growing or grown on land for rent due for the same."

It is the duty of the officer to whom an execution is directed and delivered, to make reasonable exertion to levy it on the property of the defendant, and if he is guilty of gross negligence in this, he will be liable; and the mere want of knowledge of the debtor's having estate or effects, or an averment that the plaintiff did not point them out to him on which to levy, is not sufficient to excuse the officer. *Breese Rep.*, *App.*, 15.

When the constable finds property which is liable to execution, the next step is to levy upon it, and an actual levy is necessary to justify the officer in selling it.

Gale's Stat., 588. "SEC. 1. That in all cases when an execution shall be issued by any justice of the peace in this state, directed to any constable of a different county, it shall be the duty of such constable receiving the same, to proceed, as in other cases, to make a levy on the personal property of the defendant in such execution."

In the case of Beekman *v.* Lansing, 3 *Wend. Rep.*, 446, Marcy, Justice, in delivering the opinion of the court, says: "What shall constitute a levy is not very distinctly defined in the reports of cases in this court. In England the officer enters upon the premises in which the defendant's goods are, and leaves one of his assistants in possession of them, or he causes an inventory to be taken, and removes them. We are not disposed to go this length, but are of opinion that the officer should enter upon the premises where the goods of the defendant are, and take actual possession of them, (if they are of such kind that possession of them can be taken.)" The goods should be brought under the view of the officer, and within his power, to constitute a levy; thus, if property be locked up in a store-house, it would not be a sufficient levy for the officer to proclaim at the outside of the building that he levied on the goods in it, but he should open the store and make the levy. 16 *Johns. Rep.*, 287. To constitute the levy, the constable must not only have a view of the goods, but must assert his title to them by virtue of the execution; he must do enough to render himself chargeable as a trespasser, but for the protection of the process in his hands. 14 *Wend. Rep.*, 123.

Upon making a levy, it is necessary that the constable should make an inventory of the property levied upon. *Gale's Stat.*, 413, § 53.

The constable should endorse on the execution the time it is delivered to him. This is important, as the execution first delivered to the officer binds the personal property, though issued upon a junior judgment. *Breese Rep.*, 290.

When a constable has made a levy upon personal property, he should endorse the same upon the execution, and such endorsement will be *prima facie* evidence for the officer, that

the levy was made, which may often be necessary for him to prove, and which it would often be difficult to prove by other evidence. 1 *Scam. Rep.*, 519. 7 *Cowen's Rep.*, 310.

Gale's Stat., 413. "SEC. 53. Every constable to whom an execution shall be delivered, shall endorse on the back of the same an exact memorandum of the day and hour when the same shall have come to his hands, and shall immediately proceed to levy the same; endorsing also on the back of the execution the date of such levy, and making an exact inventory of the property on which the same shall have been levied."

At common law, writs of execution had relation to their test, and subjected the estate of the defendant from that time to be levied on and sold, wherever it might be found, between different plaintiffs against the same defendant. However, the law created no lien in favor of one to the prejudice of the other, on account of the age of their executions, but it imposed an obligation on the officer to act impartially, and of two executions in hand at the same time, to satisfy that first which was first received. If he departs from this rule, and levies the last execution first, he does it at his peril, and though a sale under that would be legal as respects purchasers, the officer would be responsible to the plaintiff in the first execution. *Breese Rep.*, 290.

By the common law, the execution as against the goods and chattels related back to the test; so that if the defendant had afterwards sold the goods, though *bona fide* and for a valuable consideration, they were still liable to be taken in execution in whose hands soever they were. *Cro. Eliz.*, 174. 7 *Term Rep.*, 21.

By the statute of 29 Car. II., ch. 3, it was enacted "That no writ of *fi. fa.* or other execution shall bind the property of the goods of the party against whom such writ of execution is sued forth but from the time that such shall be delivered to the sheriff," who, upon receipt thereof, endorses the day of the month when received. *Jac. Law Dic.*, (*tit. Execution.*) The meaning of the words that the goods shall be bound from the delivery of the writ to the sheriff is, that after the writ is delivered and the defendant makes an assignment of them, (except in market overt,) the sheriff may take them in execution. 4 *East Rep.*, 540. The goods of the defendant are bound from the time of the delivery of the execution to the sheriff, and any assignment of them by the defendant afterwards is void. 16 *Johns. Rep.*, 287. 18 *Johns. Rep.*, 311, 363. The extent to which goods are said to be bound is, that the execution binds the property as against the party himself, and all claiming by assignment from, through, or under him, but it does not so vest the property in the goods absolutely as to defeat the effect of a sale thereof made by the sheriff under an execution. 4 *Cowen's Rep.*, 468.

A constable cannot maintain trover for goods taken out of the possession of the party against whom the execution issued until he has made a levy. He has only a right to seize the goods if he can find them. 12 *Johns. Rep.*, 403. And if a defendant hides his goods in secret places so that the plaintiff cannot come at them to take them in execution, it is said no action lies against him; *Jac. Law Dic.*, (*tit. Execution*;) for the constable does not obtain a special property in the goods until he has made an actual levy. 12 *Johns. Rep.*, 407. But, after he has seized goods on the execution, he may maintain an action of trover against any person who takes them away and converts them before a sale. 2 *Saund.*, 47. 3 *Cowen's Rep.*, 272. *Breese Rep.*, 290.

Gale's Stat., 413. "SEC. 52. The personal property of every defendant in a judgment before a justice of the peace, shall be bound for the payment of such judgment, from the delivery of the execution to the constable, issued thereon."

It will be perceived that the above sections are a substantial re-enactment of the statute of 29 Car. II., ch. 3, in respect to the time when the execution becomes a lien, and the extent thereof.

In the case of Garner *v.* Willis, *Breese Rep.*, 290, Chief Justice Wilson says, "this statute changes the common law only so far as to limit the commencement of the binding efficacy of the executions to the time of their delivery to the officer. It was certainly not intended to give them a more extensive operation than they had before its passage." And although the report of that case refers to the statute regulating judgments and executions, the opinion was undoubtedly based upon the above statute concerning justices' courts.

In England it has been held that neither before the statute nor since, is the property of the defendant divested by the delivery of the *fi. fa.*, and, of course, the sheriff has no property in the goods which will entitle him to maintain trespass or trover against a person who takes and converts such goods, unless he have made an actual levy upon them. 4 *East Rep.*, 536. And upon this principle it is, that where two executions against the same defendant come into the same constable's hands, at different times, if the constable levies the last execution first, a sale under that would be good so as to vest the title in the purchaser; but the constable would be responsible to the plaintiff in the first execution. *Breese Rep.*, 290. 4 *Cowen's Rep.*, 468. The reason given is, that sales made by a constable ought not to be defeated, for if they were, no man would buy goods levied upon by a writ of execution. 4 *East Rep.*, 539.

The constable cannot justify breaking open the outer door of the dwelling house of the defendant, in search either of his goods or the goods of any of his family who are defendants, and this includes his servants and lodgers, where the execu-

tion is against any of them: the house is a protection to them all. 13 *Mass. Rep.*, 520. But he may enter the house of the defendant when the door is open and seize the goods of the defendant there found, or the house of a stranger; and this by night or by day, if the door be open. 2 *Dunl. Pr.*, 795. My dwelling house will not protect the goods of a stranger, that is, one not of my family; and after demand and refusal, it may be broken to seize them. 13 *Mass. Rep.*, 520. There is, however, this difference between the constable's entering the house of the defendant and of a stranger, that, in the former case, his justification does not depend on his finding or not finding the defendant's goods therein, but in the latter case he is not justified unless it should turn out that the defendant has goods in the house which are liable to be taken in execution. 5 *Taunt. Rep.*, 769. If the outer door of the defendant's house be open and the constable enters, he may afterwards break an inner door or trunk to take the goods. 3 *Bl. Com.*, 417. An outhouse, or barn, or a store, or ware-house, standing separate from the dwelling-house, may be broken open and goods may be taken through the windows, if open. 16 *Johns. Rep.*, 288. And so, if a man lets out his house, reserving a room for himself, it is no protection to him if the officer gets regularly into the outer door of the main building. 5 *Johns. Rep.*, 352.

The constable may take with him the power of the county, that is, what number of persons he may think necessary to aid him to execute the process; and such persons as he may summon to assist him, are bound to attend. *Dalt. Sheriff*, 354. And, if a stranger comes in aid of an officer in doing a lawful act, at the request of the officer, as executing legal process, but the officer, by reason of some subsequent improper act, becomes a trespasser *ab initio*, the stranger does not thereby become a trespasser. But when the original act of the officer is unlawful, any stranger who aids him will be a trespasser, though he acts by the officer's command. 10 *Wend. Rep.*, 128. 5 *Wend., Rep.*, 238.

After a levy is made upon sufficient property of the debtor he is discharged, and no subsequent levy can be made upon other property. 7 *Cowen's Rep.*, 13. 12 *Johns. Rep.*, 207. But this rule will not apply if it should afterwards appear that the property did not belong to the defendant, and in consequence thereof it was given up. So, if the property should be sold and the execution returned satisfied, if a third person should afterwards recover the value thereof from the plaintiff or the officer, on the ground that it was his property, the judgment would not be discharged; and in the circuit court leave would be given to strike out the endorsement on the execution and issue a new one. 5 *Cowen's Rep.*, 280. Such leave could not be obtained in a justice's court, and perhaps it would be necessary that an action should be brought on the judgment. A levy is not a satisfaction of the judgment, if the defendant has

removed the property after the levy, so that the officer cannot find it. 11 *Wend. Rep.*, 125.

An execution, after the expiration of the time when by law it should be returned, is officially dead, and its delivery to an officer in the first instance, does not create a lien which can be preserved and continued to a subsequent execution issued after the return of the first. *Breese Rep.*, 291.

A justice's execution levied, if suffered to expire without a sale, loses its lien. 7 *Cowen's Rep.*, 310.

The constable cannot pay the plaintiff with his own money and levy or retain the levy under the execution, even though the defendant agree with him that this may be done for the constable's security. 7 *Johns. Rep.*, 426. 15 *Johns. Rep.*, 443.

If goods are levied upon by one execution, upon a subsequent one being given to the same constable, the goods levied upon first are bound by it without an actual levy under the second execution. 7 *Taunt. Rep.*, 56. 17 *Johns. Rep.*, 116.

When the constable has levied upon the goods of the defendant to the value of the debt, he should take them into his possession and remove them, if they are such as can be removed, or take a bond with good security for their forthcoming on the day of sale, as he would be liable for the amount of the execution if the goods were lost, or removed so that they could not be sold by him. 9 *Johns. Rep.*, 96.

Gale's Stat., 413. "Sec. 54. Any constable shall be authorized to remove property levied on by him, when it shall be necessary for the safe keeping of the same: *Provided*, that if the defendant shall desire to retain the property so levied on, until the day of sale, it shall be lawful for the said constable to allow the defendant so to keep the same, if said defendant shall give bond to said constable, in double the amount of the execution, with good security, conditioned for the delivery of said property, to the same constable, at the time and place of sale to be named in said bond; and if the said property shall not be delivered, as aforesaid, at the time and place of sale, the constable having the execution may proceed to levy the same, upon the same or any other property of the defendant, or upon the property of the security in such bond, and shall sell the same, giving two days public notice of such sale by advertisement, to be posted at one public place."

As the statute does not declare that an instrument in any other form than that prescribed shall be void, it is presumed that any agreement would be good which the constable might make with a third person, for the bailment of property taken on execution, and for the re-delivery thereof to him. 2 *Johns. Cas.*, 239. 10 *Peters' Rep.*, 363.

Independent of any statutory provision, it has been held that, when property has been levied upon by an officer and a third person gives a receipt for the same and promises to return or deliver the goods to the officer when demanded, or pay

the amount due on the execution, that such promise is founded on a good and sufficient consideration, and is obligatory upon him and may be enforced. 9 *Johns. Rep.*, 361. 13 *Wend. Rep.*, 147. The constable, however, must demand the goods within the life of the execution, or the receiptor would be discharged. 9 *Johns. Rep.*, 361.

If an officer attach goods and bail them to a stranger for safe keeping, taking an engagement of the bailee to re-deliver them on demand, the bailee will be discharged from his engagement if the goods be not demanded of him before the attachment is dissolved, unless the officer be accountable for them to the debtor. 9 *Mass. Rep.*, 258. 11 *Mass. Rep.*, 317.

If the goods turn out to be the property of a third person, the receiptor is discharged wholly of his obligation, for there is then no consideration for his promise. The constable is also discharged from his liability on the execution, and, so, if the title fail as to part of the goods, he is discharged as to them. 12 *Mass. Rep.*, 163. 13 *Mass. Rep.*, 224.

Any constable to whom an execution shall have been delivered and whose term of office shall expire before the expiration of the time within which the return of such execution is required by law, shall be authorized to proceed in all matters relating to said execution and in the same manner to collect the same that he might have done had the term of office of such constable not expired. *Sess. Laws*, 1841, *p.* 176.

After the constable has made a levy upon the property of the defendant, he "shall appoint a day and hour for the sale of said property, giving ten days previous notice of such sale, by advertisement in writing, to be posted up at three of the most public places in the county; and on the day so appointed, the said constable shall sell the property so levied on, or so much thereof as may be necessary to pay the debt, interest, and costs, to the highest bidder." *Gale's Stat.*, 413, § 53.

Sess. Laws of 1842–3, *p.* 188. "SEC. 5. All sales of personal property, made by virtue of any execution, order, or decree of any of the courts of this state, whether of record or not, shall be made at the residence of the defendant; *Provided*, he or she has a place of residence in the county where such process, execution, or decree exists; except the defendant otherwise requests; *Provided*, in all cases where the defendant fails to give the officer a delivery bond, in the manner now prescribed by the laws of this state, said officer in such cases may remove and sell said property where he may choose."

It is enough to save the lien, provided the advertisement be in sufficient season, to sell at any time before the execution is returnable. 13 *Johns. Rep.*, 249. 9 *Johns. Rep.*, 361.

The goods and chattels levied on must be present and pointed out at the time of sale, or no property in them will pass to

the purchaser. 17 *Johns. Rep.*, 116. And the articles should be pointed out to the inspection and examination of the bidders, and sold separately or in suitable lots. Yet, if part of the property be present and proclaimed, though property which is absent be set up for sale in the same parcel, that which is present will pass while the title to the absent property remains unchanged. 14 *Johns. Rep.*, 222. If no bidders attend, the constable should postpone the sale and give notice to the plaintiff, who should attend and bid himself. But if he should neglect to attend, the constable would be excused in returning that the property remains on hand for the want of bidders. So he would be excused in making such a return, if he could not sell the property but at a great sacrifice. 2 *Cowen's Rep.*, 421. A sale on execution may be adjourned, after it has commenced, to a different time and place, and the completion of the sale will then be good, if there be no fraud or abuse. 5 *Johns. Rep.*, 345.

2. *Of execution against the body.*

The writ of *capias ad satisfaciendum* is an execution of the highest nature, inasmuch as it deprives a man of his liberty till he makes the satisfaction awarded. 3 *Bl. Com.*, 414. It is directed to any constable of the county, commanding him to take the body of the defendant therein named, and convey him to the common jail of the county, there to remain until the execution shall be satisfied and paid. And it is the duty of the constable to whom the *ca. sa.* is delivered, to arrest the defendant and commit him to the custody of the keeper of the jail, where he must remain until he makes satisfaction or is discharged by due course of law.

There does not appear to be any provision in the statute regulating the time when a *ca. sa.* may issue. The 26th section of "An act concerning justices of the peace and constables," seems, by its terms, to extend only to executions against the goods and chattels of the defendant. The rule at common law is that a party may proceed to compel satisfaction by execution immediately upon judgment being entered. 3 *Bl. Com.*, 401.

By the act of 1829, it is provided that "Upon all judgments in an action of trespass or trover, the justice may issue an execution against the goods and chattels, or body of the defendant, at the election of the plaintiff. And in cases of judgment for debt, whenever the plaintiff or his authorized agent shall make oath before the justice, in whose office such judgment may be, that he or she verily believes the defendant or defendants to be able to pay such judgment, and withholds the money, or secretes his, her, or their property from the officer, so that the debt cannot be levied, it shall be lawful for the

plaintiff to demand, and for the justice to issue execution against the body of such defendant or defendants." *Gale's Stat.*, 419, § 1.

It seems necessary, where the judgment is upon contract, that an execution against the goods and chattels of the defendant should be issued and returned by an officer that he cannot find any property, or not sufficient to satisfy the execution, before a *ca. sa.* can be issued against the body of the defendant.

It is a general rule of law, that the taking of the body of the debtor in execution, is a satisfaction of the debt. 5 *Wend. Rep.*, 58.

If you once charge the body of the defendant in execution on a *ca. sa.*, it is a discharge of the debt, unless the defendant makes an escape, or is privileged, or die in execution. *Jac. Law Dic.*, (*tit. Execution.*) A discharge under the insolvent laws of this state would only be a discharge from arrest, and the debt might still be collected by execution against the goods and chattels, the discharge being the act of the law, and not with the consent of the plaintiff.

If the plaintiff consent to the defendant's being discharged out of execution upon an agreement, he cannot afterwards retake him, 16 *Johns. Rep.*, 181, though it be on terms which are not afterwards complied with, or upon giving a fresh security which afterwards became ineffectual. 2 *Bac. Ab.*, 719. The debt is extinguished, 2 *Dunl. Pr.*, 833, and the plaintiff cannot resort to the judgment again, or charge the defendant's person in execution, even though he were discharged the first time, by the plaintiff's consent, upon an express undertaking that he should be liable to be taken in execution again if he failed to comply with the terms agreed on. 5 *Johns. Rep.*, 364. So if the plaintiff consent to discharge one of several defendants taken on a joint *ca. sa.*, he cannot afterwards retake such defendant, or take any of the others. 6 *Term Rep.*, 525. But if one be discharged under an insolvent debtor's act, that will not discharge the other; for being the act of the law, it cannot be said to have been with the plaintiff's assent. 5 *East Rep.*, 147. 2 *Bac. Ab.*, 719. If the debtor has escaped, and whilst out of custody the creditor give him permission to remain at large until a certain time, it is not a discharge or defence to an action for an escape, especially if obtained fraudulently. 16 *Johns. Rep.*, 181. An agent, or a regular attorney, cannot discharge a defendant from execution without actual satisfaction of the debt. 10 *Johns. Rep.*, 220. In a popular action, the plaintiff having no right to discharge the judgment, or compound with the defendant without leave of the court, or without payment of the judgment, his discharge, so far as relates to the moiety of the penalty belonging to the people, is void, and cannot excuse an escape. 11 *Johns. Rep.*, 476.

According to the English practice, it appears the sheriff has

no power to receive money of the defendant upon an execution against the body. 2 *Bac. Ab.*, 719. But in New York it is different, and payment to the sheriff will discharge the defendant. 9 *Johns. Rep.*, 263. And such, it is probable, will be the rule in this state, for the process is given to the party for the purpose of enforcing the collection of his debt, and ought not to be used as an instrument of oppression. But a sheriff cannot release the defendant on his giving security for the payment of the debt. 7 *Johns. Rep.*, 159.

It is the duty of the constable to commit the party immediately, unless he pay the debt; and it is an escape if the defendant, being taken in execution, be afterwards seen at large for any the shortest time. 2 *W. Bl. Rep.*, 1048. Thus, if the officer, having arrested the defendant on execution, commit him to a third person who permits him to go at large; 4 *Mass. Rep.*, 391; or if the officer arrest a debtor in execution, and leave him in the custody of a third person, and do not commit him till the next day; 9 *Johns. Rep.*, 329; or if he discharge the defendant from arrest on the promise of a third person to pay the debt if he fail to re-deliver him. 13 *Johns. Rep.*, 366.

A justice, as such, has no authority to discharge a prisoner in execution, and if a constable discharge him by order of the justice, he is, notwithstanding, liable for the escape. 9 *Johns. Rep.*, 146.

In these cases of voluntary escape, the officer would be liable, and he would have no right to retake the defendant on the same process; nor will a voluntary return of the prisoner into his custody before action is brought for the escape, operate as a defence against it. 2 *Johns. Cas.*, 13. 5 *Term Rep.*, 25.

But in case of a negligent or involuntary escape, the officer may retake the prisoner, and such recaption, or a voluntary return before action brought for the escape, is a good defence to such action; 10 *Johns. Rep.*, 573; and in such a case he may retake the prisoner, even on Sunday. 6 *Mod. Rep.*, 231, 295. Negligent escapes are where the prisoner escapes without his keeper's knowledge or consent; and then, upon fresh pursuit, the defendant may be retaken, and the constable shall be excused if he has him again before any action is brought against himself for the escape. A rescue of a prisoner in execution, when going to jail, will not excuse the constable from being guilty of, and answering for, the escape, for he ought to have sufficient force to keep him. 3 *Bl. Com.*, 415.

II. OF INQUEST OF OFFICE AND OF THE TRIAL OF THE RIGHT OF PROPERTY.

1. *Of inquest of office.* On an execution, the constable is bound at his peril to take only the goods of the defendant, and, therefore, if he take the goods of a third person, though the plaintiff assure him they are the goods of the defendant,

he is a trespasser, for he is obliged at his peril to take notice whose the goods are, and, if he doubt whether the goods shown him are the defendant's, he may summon a jury to satisfy himself. 2 *Bac. Ab.*, 715. 3 *Term Rep.*, 633. Our statute, authorizing a trial of the right of property, has not changed the law in this respect, and has merely provided a cumulative remedy. 4 *Scam. Rep.*, 550. This proceeding of the constable, however, is not conclusive in any case, for inquests of office are always traversable, and, therefore, an inquisition made by a constable's jury to ascertain to whom the property of the goods taken under an execution belonged, though found in favor of the claimant, is not admissible evidence in an action of trover for the goods, brought by the claimant against the constable. 2 *H. Bl. Rep.*, 437. An inquisition, however, is a defence in an action against the constable for not proceeding to sell, and for a false return of *no property*. Yet, if the plaintiff in the execution offer in writing an adequate indemnity to the constable, he is bound to proceed and sell, and cannot excuse himself by taking an inquisition. 8 *Johns. Rep.*, 143. 15 *Johns. Rep.*, 147.

The plaintiff is not bound to tender a bond of indemnity until after the jury have passed upon the question of property; and the officer acts at his peril in making a return *no property*, unless in pursuance of the inquisition. 8 *Cowen's Rep.*, 65. 4 *Term Rep.*, 633.

A constable who levies on property and returns *nulla bona*, assumes upon himself the responsibility of proving property out of the defendant in the execution and thus supporting his return. *Prima facie* evidence of the falsity of the return is sufficient to put the constable upon proof of its correctness. Thus, showing the defendant in an execution to be in posession of goods and chattels without showing the property in such goods to be in him, is enough to put the constable upon his defence when sued for falsely making a return of *nulla bona*. It seems that a constable who, after a levy, becomes satisfied that the property in the goods levied upon is not in the defendant in the execution, may protect himself by calling a jury and obtaining their inquisition finding such fact. 5 *Wend. Rep.*, 309.

Although the above cases have all been decided in reference to the duties and liabilities of sheriffs upon execution placed in their hands, the supreme court of New York, in the case of Platt *v.* Sherry, say "we see no objection either in principle or in practice to the constable's exercising that power. The same reasons which extend this protection to the sheriff are equally applicable to him." 7 *Wend. Rep.*, 236.

2. *Of the trial of the right of property.* An important provision is contained in the statutes relative to trying the right of property when levied upon by execution or attachment.

Sess. Laws of 1838–9, 206. "Sec. 1. That in all cases where

any personal property shall be taken by virtue of an execution or attachment issued by any justice of the peace, and shall be claimed by any person or persons other than the defendant in such execution or attachment, and shall give notice in writing of his or their claim and intention to prosecute the same, it shall be the duty of the constable to notify the plaintiff in execution or attachment of such claim, and the time and place of trial; and if the justice who issued such execution or attachment be absent from the county, or unable to attend to such trial, it shall be the duty of the constable serving such execution or attachment to notify the plaintiff in execution that he will attend before some other justice of the peace of the county, (naming him,) and shall also designate some day and hour for the trial of the right of said property.

"SEC. 2. That it shall be the duty of any justice of the peace, when notified by any constable of any person or persons claiming property as aforesaid, to enter such cause on his docket, and to proceed in all cases to have the right of such property tried, in the same manner as if the execution or attachment had been issued by him: and in case the property shall appear to belong to the claimant, the justice shall enter judgment against the plaintiff in execution or attachment, for the costs that may have accrued on such suit; and on failure of the plaintiff to pay the same, the justice may issue execution therefor; but in all cases where it shall appear that the property claimed belongs to the defendant in execution, the justice shall enter judgment against the claimant of the property for the amount of costs that shall have accrued, and issue execution therefor as in other cases."

Gale's Stat., 588. "SEC. 1. That in all cases when an execution shall be issued by any justice of the peace in this state, directed to any constable of a different county, it shall be the duty of such constable receiving the same, to proceed, as in other cases, to make a levy on the personal property of the defendant in such execution.

"SEC. 2. That it shall be the duty of any constable having an execution as aforesaid, after making a levy on the property of the defendant, and such property being claimed by another person or persons, to notify such person or persons that he will attend before some justice of the peace of the county, naming him, on some day to be designated (by him the said constable,) for the purpose of having the right of said property tried, said constable designating the day and hour when such trial of the right of property shall take place: *Provided*, That said trial shall not be deferred exceeding ten days from the time such levy may have been made.

"SEC. 3. That it shall be the duty of any justice of the peace, when notified of any person or persons claiming property as aforesaid, to enter such case on his docket, and to

proceed in all cases, to have the right of such property tried as if the execution had been issued by him; and in case the property may appear to belong to the claimant, the justice shall enter judgment against the plaintiff in execution for the costs that may have accrued on such case, and on failure of the plaintiff to pay the same, the justice may issue execution, directed to any constable of the county in which such plaintiff lives, for the amount of such costs not paid; but in all cases, when it may appear that the property claimed belongs to the defendant in execution, it shall be the duty of the justice of the peace to enter judgment against the claimant of the property for the amount of such costs as have accrued, and execution may issue therefor as in other cases."

"SEC. 4. That in all cases when the plaintiff in the execution neither resides in the county where judgment was rendered, nor in the county in which such trial of the right of property is had, it shall not be necessary for the constable to give said plaintiff notice; but the trial shall be conducted in the same manner as if actual notice had been given, and in case the property shall be found to be the property of the claimant, the plaintiff in the execution shall be bound for all costs that may have accrued."

It has been held that the claimant is not required, in the notice he serves on the constable, to state on whose execution the levy had been made. It is sufficient to notify the constable that he claims the goods levied on, forbids the sale, and intends to prosecute his claim. 1 *Scam. Rep.*, 266. Objections to a notice should be made in the first instance, and it will be too late to make them on appeal.

A landlord who has distrained upon the goods of his tenant, has a sufficient interest in them to enable him to be the claimant of the same on the trial of the right of property, if they are subsequently taken in execution. And it seems that any person having an interest in goods and chattels, may be a claimant of the same, and have a trial of the right of property between the creditor in an execution levied on the same and himself. 1 *Scam. Rep.*, 343. It is apprehended, however, that a claimant, having only an interest in goods, should be in the possession, or have the right of taking into possession, the goods levied on; for, if the defendant was in possession and had the right of retaining the goods for a certain length of time, it would be such an interest as might be sold by virtue of the execution.

The proceedings under these statutes are to be had before the constable who serves the execution or attachment, together with the justice who issued the process; *Gale's Stat.*, 587, § 6; but, if he should be absent from the county, or unable to attend to the trial, *Sess. Laws of* 1838–9, *p.* 206, or where the execution is issued to some other county, *Gale's Stat.*, 588, then with any justice of the county wherein the

execution or attachment shall be levied. And the same proceedings shall be had before the constable and justice as in trials of the right of property before sheriffs.

Upon receiving notice from the claimant of property of his claim and intention to prosecute the same, it is the duty of the constable forthwith to summon a jury of twelve respectable householders of the county, to meet at a place to be designated by him, before himself and a justice by him to be named before the day appointed for the sale of such property; and the said constable and justice are then and there to proceed to enquire by the oath of said jury, whether the right of such property be in such claimant or not. *Gale's Stat.*, 586.

Sess. Laws of 1842–3, *p.* 189. "That hereafter in trials of the right of property taken on execution, attachment, or other process, by constables, the number of jurors shall be six instead of twelve, unless all the parties to the trial shall agree upon a larger number, not exceeding twelve, in which case the number agreed on shall constitute the jury; *Provided*, that either party shall have the right to require twelve jurors upon advancing the additional costs and fees accruing in consequence of increasing the number over six, such additional costs and fees not being in any event chargeable against the other party."

The constable and justice, when associated under these statutes, appear to constitute a court invested with judicial powers, and may hear and determine all objections which may be raised to the proceedings, 1 *Scam. Rep.*, 267, and all questions relative to the admission or rejection of evidence. 1 *Scam. Rep.*, 340, 343.

The justice of the peace presiding with the constable on a trial of the right of property, shall swear the jurors when empannelled, and the witnesses produced by the parties, and retain the papers relating to the proceedings. *Gale's Stat.*, 587, § 6.

Sess. Laws of 1838–9, *p.* 207. "Sec. 3. That in all cases of trial of the right of property before any justice of the peace, constable, or sheriff, the said justice, constable, or sheriff shall be authorized to issue subpœnas for witnesses, and compel their attendance, in the same manner as in the trial of causes before justices of the peace in the circuit courts of this state."

The court, when organized, may continue the proceedings or postpone the trial such reasonable time, on the application of either party, as they may think proper for the purpose of procuring testimony; *Gale's Stat.*, 586, § 2; excepting, in the case of an execution from a foreign county, when the trial cannot be postponed to a time exceeding ten days from the date of the levy.

On the trial of the right of property levied on by attachment, the writ of attachment may be received in evidence for

the purpose of showing the plaintiff's right to take the property, and, for that purpose, is the only evidence that can be adduced. 1 *Scam. Rep.*, 519. On the trial of the right of property levied on by execution, the claimant cannot object to the execution. By proceeding under the statutes authorizing the trial of the right of property, he admits the validity of the execution, and only claims that it has been levied on his property and not on the property of the defendant in the execution. If the execution is a nullity, the remedy is by an action of trespass, trover, or replevin. 2 *Scam. Rep.*, 21.

In the case of Clifton *v.* Bogardus, 1 *Scam. Rep.*, 32, it was held that, in a trial of the right of property, the defendant in execution is a competent witness for the claimant; that the interest to disqualify a witness must be in favor of the party calling him. But it is now provided by the statute, that in no case of the trial of the right of property under the statute, shall the defendant in execution be a competent witness. *Gale's Stat.*, 588, § 3.

"After the jury shall have agreed on their verdict, the [constable and justice] shall reduce the same to writing, and it shall be signed by all the jurors, and the [constable] shall thereupon restore the property, if found to belong to the person claiming, or shall proceed on such execution or attachment, if the property shall not be found to be in the claimant, in the same manner as if no claim had been made." *Gale's Stat.*, 586, §§ 3, 6.

Where, on the trial of the right of property, the jury, by their verdict, found the title in the defendant in the attachment, it was held that the finding was sufficiently formal and explicit, as it negatived the title set up by the claimant. 1 *Scam. Rep.*, 519.

Gale's Stat., 587. "SEC. 7. The verdict of the jury in all cases under this act, shall be a complete indemnity to the sheriff or other officer, in proceeding to sell, or restore any such property according to the verdict; and in case of an appeal, the sheriff or other officer shall retain such property, unless the party claiming, or the defendant in execution, shall enter into a bond with sufficient security, for the delivery of such property to the sheriff or other officer, if the judgment of the court shall be against the claimant."

Sess. Laws of 1838–9, *page* 207. "SEC. 2. In case the property shall appear to belong to the claimant, the justice shall enter judgment against the plaintiff in execution or attachment, for the costs that may have accrued on such suit; and on failure of the plaintiff to pay the same, the justice may issue execution therefor; but in all cases where it shall appear that the property claimed belongs to the defendant in execution, the justice shall enter judgment against the claimant of the property for the amount of costs that shall have accrued, and issue execution therefor as in other cases."

In the case of Pearce and Sharp *v.* Swan, 1 *Scam. Rep.*, 266, which was a trial of the right of property before a constable and justice together with a jury, and appealed to the circuit court, where the cause was tried by a jury, who returned a verdict that the property belonged to Swan, who was the claimant, and thereupon the circuit court rendered judgment, "That the property be retained by the said Swan, and that he recover his costs against the said defendants," Pearce and Sharp, the plaintiffs in the execution on which the property was taken. On error to the supreme court, one of the errors relied upon was, that it was uncertain against whom the judgment was given. Lockwood, justice, in delivering the opinion of the court, says: "The judgment is rendered perfectly clear, when taken in connection with the verdict. The verdict finds the property to belong to Swan, and the judgment is that Swan retain the property, and that he recover his costs against the said defendants. The said defendants can mean only Pearce and Sharp, as the costs are expressly given to Swan."

The verdict of the jury, in proceedings under the foregoing statutes, is not only a full indemnity to the officer in proceeding to sell or restore the property according to the finding thereof, but it has been held that the finding of the jury, and the judgment rendered in accordance therewith, in establishing the fact to whom the property belongs, is conclusive between the parties. 1 *Scam. Rep.*, 340. The proceedings by the statute are termed a suit, and are so considered by the court, and the judgment rendered determines the right of the claimant, and he cannot afterwards bring another suit for the same property. The notice of claim and intention to prosecute the same, seems, in its operation, to be a full and complete substitute for a plaint in replevin.

Gale's Stat., 587. "Sec. 5. In case either party shall think himself or herself aggrieved by the verdict of the jury, he or she may appeal to the circuit court, in which case the party appealing shall give bond, with sufficient security, to prosecute such appeal without delay, and to pay all costs that have accrued or may accrue on such appeal, if judgment be given against him, in the circuit court; which bond shall be in a sum sufficient to cover all costs, and be payable to the opposite party."

Gale's Stat., 588. "Sec. 3. All appeals from the judgments on the trial of the right of property, shall be demanded on the day of such trial, and bond entered into before the clerk of the circuit court within five days from such trial; and in all cases of the trial of the right of property before a justice of the peace, either party may take the case into the circuit court by writ of certiorari, as provided in the 'Act concerning justices of the peace and constables,' approved, February 3, 1827: *Provided*, that in all cases of said appeals,

the praying thereof shall be supersedeas, and stay all further proceedings until the expiration of five days."

Upon an appeal being taken and bond being filed, the justice of the peace shall transmit all the papers and proceedings relative to the trial to the clerk of the circuit court, who shall enter said appeal on his docket, and the court shall proceed to try the right to such property in the same manner as is directed in the foregoing statute; and in all such cases judgment shall be given against the party failing for costs, and the clerk shall issue execution thereon for the same. *Gale's Stat.*, 586, §§ 5, 6.

III. OF GARNISHMENT.

Previous to the passage of "An act in relation to garnishees," in a court of law, a judgment creditor had no effectual means of reaching debts due to the defendant, or property by him deposited in the hands of third persons, or of coercing the debtor to appropriate debts or property so circumstanced to the payment of his debt. And the remedy by imprisonment on execution for compelling the satisfaction of a judgment rendered upon contract being known to the laws of this state only in the case of fraud, or where it is made to appear that the debtor refuses to surrender his property for the satisfaction of any execution upon such judgment, it was necessary there should be some statutory provision to enable creditors to reach the effects and property of the debtor by process and proceedings in these courts.

For this purpose it is enacted, *Sess. Laws of* 1838–9, *p.* 86, § 1, "That whenever a judgment has heretofore been rendered by any court of record, or shall hereafter be rendered by any court of record, or any justice of the peace, in this state, and an execution against the defendant or defendants in said judgment shall have been returned by the proper officer, 'no property found,' on the affidavit of the plaintiff, or other credible person, being made before the clerk of said court or justice of the peace, that said defendant or defendants have no property within the knowledge of such affiant, in his or their possession, liable to execution; and that such affiant hath just reason to believe that another person or persons is or are indebted to such defendant or defendants, or hath or have any effects or estate of such defendant or defendants in his or their hands, it shall be lawful for said court, or justice of the peace, to cause the person or persons supposed to be indebted to, or supposed to have any of the effects or estate of, the said defendant or defendants, to be summoned forthwith to appear before said court or justice, as a garnishee or garnishees; and said court, or justice of the peace, shall examine and proceed against such garnishee or garnishees, in the same manner as is required by law against garnishees in original attachments.

"SEC. 2. No proceedings against a garnishee or garnishees shall be quashed or set aside, or said garnishee or garnishees discharged on account of any insufficiency of the original affidavit or summons, if the plaintiff or plaintiffs, or other credible person, for him, shall cause a legal and sufficient affidavit to be filed, or the summons to be amended in such time and manner as the courts, or justices of the peace, shall respectively in their discretion direct; and in that event, the cause shall proceed as if such proceedings had originally been sufficient."

IV. OF THE LIABILITY OF THE CONSTABLE AND HIS SURETIES.

Gale's Stat., 411. "SEC. 43. Every constable, before he shall enter upon the duties of his office, shall execute and deliver to the clerk of the county commissioners' court, of the proper county, a bond to be approved by said clerk, with one or more good and sufficient freeholders as his securities, in the sum of [one thousand] dollars, conditioned that he will faithfully discharge the duties of his office of constable; and that he will justly and fairly account for, and pay over, all moneys that may come to his hands, under any process, or otherwise, by virtue of his office; the said bond shall be made payable to the county commissioners of the county in which such constable shall be appointed, and their successors, for the use of the people of the state of Illinois, and shall be held for the security and benefit of all suitors and other persons who may be interested in, or become injured by the official conduct of such constable."

Gale's Stat., 426. "SEC. 1. That if any sheriff, coroner or other officer, shall fail, on demand made by the complainant, his executors, administrators or lawful attorney, to pay over any money collected by virtue of any execution, process or fee bill, not exceeding one hundred dollars, it shall be lawful for the party so aggrieved, or by his lawful attorney, to commence an action against such sheriff, coroner or other officer, and his securities, by summons before any justice of the peace, and if upon hearing the case, it shall appear to such justice of the peace, that money has been collected upon such execution, process or fee bill, and not paid over to the party entitled to the same, on demand made as aforesaid; and if it shall appear further, that the defendant or defendants sued with the sheriff or other officer, are his securities, by the production of the original bond or a certified copy thereof, of the sheriff, coroner or other officer, under the hand and seal of the clerk of the county commissioners' court, the said justice shall proceed to render judgment against said defendants for the amount so received by the said sheriff or other officer, belonging to the plaintiff, with ten per cent. interest thereon."

Sess. Laws of 1839–40, *p.* 78. "SEC. 1. That whenever any sheriff, coroner, constable, justice of the peace, or probate justice of the peace in this state, shall, after proper demand made, fail, neglect, or refuse, to pay over any sum or sums of money, collected or received by such officer, in, and by virtue of his office, his said office shall be forfeited and vacated.

"SEC. 2. Whenever in pursuance of the laws of this state, any judgment shall be had, or taken, against any sheriff, coroner, constable, justice of the peace, or probate justice of the peace, for any failure neglect or refusal of such officer, to pay over any sum, or sums of money collected or received by him, in and by virtue of his office, and it shall appear to the satisfaction of the court, that proper demand for the same has been made, it shall be the duty of the court, or justice of the peace, before whom such judgment is had or taken, further to adjudge and decree that the office of such officer, so failing, neglecting, or refusing, as aforesaid, is forfeited and vacated, and such vacancy shall be filled as in other cases of vacancy, as is now provided by law."

Sess. Laws of 1841, *p.* 177. "SEC. 4. If any constable shall fail or neglect to return any execution within ten days after the return day thereof, the party, in whose favor the same was issued, may maintain an action against the constable and his sureties before a justice of the peace, and recover the amount thereof with interest from the date of the judgment upon which said execution issued.

"SEC. 5. Suits may be maintained and instituted upon constable's bonds against the constable and his sureties, or against the sureties alone, without first establishing the liability of the constable by obtaining judgment against him alone."

When an execution has been placed in the hands of a constable, if his term of office expires before the return day thereof, the constable and his sureties shall be liable for any neglect of duty, and for all moneys collected upon such execution, in the same manner and to the same extent they would have been if the term of office of such constable had not expired. *Sess. Laws of* 1841, *p.* 176.

By the 12th sec. of an act passed Dec. 30, 1826, it was provided, that it should be the duty of every constable, at the end of every year thereafter, to execute and file a new bond; and, upon failing to do so, his office to be vacated.

Gale's Stat., 412. "SEC. 48. All bonds which shall be given by constables hereafter, shall remain in force until the expiration of five years after the term of service of the constable giving the same shall have been concluded: and where bonds shall be renewed in conformity with an act approved December 30, 1826, entitled 'An act to provide for the appointment of justices of the peace and constables,' the giving

of a new bond by any constable, shall not satisfy or vacate any bond previously given by the same constable; but each bond shall stand good in relation to all matters and things officially done or committed, or which ought to have been so done, within the year for which such bond shall have been given."

The 12th sec. of the act of Dec. 30, 1826, was repealed by the act providing for the publication of the laws in 1833. *Gale's Stat.*, 443.

By the terms of the above statutes an action may be brought before a justice of the peace against a constable and his securities, when the constable shall fail, on demand made, to pay over any money collected by virtue of any execution, process, or fee bill, not exceeding one hundred dollars; or when he shall fail or neglect to return any execution within ten days after the return day thereof. An action of debt on the bond, however, cannot be brought before a justice, as the amount of the penalty exceeds the jurisdiction of the justice.

The remedy provided by the statute, does not deprive a party of his common law remedy. 10 *Johns. Rep.*, 390. Therefore, where a constable has collected money on an execution and neglects to pay it over to the person entitled to receive the same, or to the justice who issued the execution, an action of assumpsit for money had and received will lie against the constable to recover the amount collected, without any previous demand being made. 3 *Johns. Rep.*, 182. 1 *Wend. Rep.*, 534. 16 *East's Rep.*, 274. So assumpsit lies against a constable for the amount of goods sold by him, though the purchaser to whom they are delivered refuses to pay for them. 9 *Johns. Rep.*, 96.

Where a constable or other officer neglects his duty or abuses the trust reposed in him by law to the injury or damage of another, an action on the case lies against him in the circuit court at the suit of the party sustaining the injury. 1 *Scam. Rep.*, 237. Thus, if a constable neglect to serve a writ or precept delivered to him, this action lies for the injury suffered by such neglect or refusal. 1 *Scam. Rep.*, 200.

Gale's Stat., 411. "Sec. 46. If the demand or debt of any plaintiff shall be wholly or in part lost, by the neglect or refusal to act, of any constable, or if any special damage shall arise to any plaintiff or defendant by the misfeasance or nonfeasance of any constable, in the discharge of any official duty, the party aggrieved may have his action for damages in the circuit court, against such constable for the injury so sustained; and shall have judgment and execution, which shall not be replevied."

An action on the case lies against the constable for suffering an escape upon civil process, or for a false return of any process by which the party is injured in his rights. 1 *Chit. Pl.*, 158. But, though a return be untrue on its face, yet the of-

ficer making it is not liable in damages if the facts of the case, truly stated, would have produced the same results to the party complaining as the return made. 1 *Wend., Rep.*, 48. 9 *Wend. Rep.*, 298.

V. OF EXECUTIONS ISSUED BY THE CLERK OF THE CIRCUIT COURT.

After a transcript of a judgment rendered by a justice of the peace shall have been certified to the clerk of the circuit court of the county in which it was rendered, and the same shall be filed by the said clerk, execution shall issue thereon out of that court as in other cases. *Gale's Stat.*, 409.

And it is apprehended that the circuit court has the power to amend an execution issued upon a transcript of a judgment filed by the clerk, and to control the same in all respects as if it had issued upon a judgment rendered in such court.

CHAPTER XI.

OF THE REMOVAL OF CAUSES TO THE CIRCUIT COURT.

1. By *certiorari.*
2. By appeal.
3. By *certiorari* under the statute.

1. *By certiorari.*

The circuit courts are the only superior courts in the state that possess original and unlimited jurisdiction. They exercise within their respective counties all the powers and jurisdiction of the courts of King's Bench and Common Pleas in England, 2 *Scam. Rep.*, 269, and perhaps of the court of Exchequer.

In the case of Lawton *v.* Commissioners of Cambridge, 2 *Caines' Rep.*, 181, it is said that "It is a position beyond contradiction, that the King's Bench in England (and this court is clothed with the same common law authority) has jurisdiction, and may award a *certiorari*, not only to inferior courts, but to persons invested by the legislature with power to decide on the property or rights of the citizen, even in cases where they are authorized by the statute finally to hear and determine." 1 *Salk. Rep.*, 147.

Whenever a new jurisdiction is erected by act of the legis-

ture, and it acts in a summary method, or in a new course different from the common law, then a writ of error lies not, but a *certiorari*. 2 *Bac. Ab.*, 456.

The necessity of a superintending power to revise the proceedings and correct the irregularities committed by inferior officers, cannot be questioned. This is its legitimate office. It does not before trial withdraw the question to be tried from the inferior jurisdiction, but may subsequently cause it to be reviewed. 20 *Johns. Rep.*, 83.

A *certiorari* to remove the proceedings of inferior tribunals, for error, into a superior court, however, is not a writ of right. 6 *Cowen's Rep.*, 396.

In all cases where a defendant applies for a *certiorari*, he must lay some ground for it before the court, supported by affidavit. 5 *Wend. Rep.*, 98.

The common law powers of the circuit court are confined to an examination of the jurisdiction of such inferior tribunals, and to questions of law arising out of their proceedings; not to an examination of their decisions upon questions of fact. Upon such questions their decision must be final, unless the statutes have provided a mode of review. 6 *Wend. Rep.*, 564.

The statutes, in providing for the removal of causes tried before justices of the peace, by appeal or *certiorari*, into the circuit court, and for a new trial, do not appear to have expressly taken away the common law right of removing the record of a justice's court into the circuit court, upon sufficient cause being assigned. And the exercise of such a power would seem to be proper in a case not contemplated by the statutes, as the party would otherwise, in such case, be without the means of redress. The principle that a court of general jurisdiction cannot be deprived of its powers by implication, is indisputable. 5 *Wend. Rep.*, 98. 1 *Burn's Justice*, 326.

A *certiorari* removes all things done from the commencement of the suit to its final termination. It removes the record itself out of the inferior court. 1 *Burn's Justice*, 331. The *certiorari* may be sometimes to remove and send up the record itself, and sometimes but only the tenor of the record, (as the words therein be,) and it must be obeyed accordingly. *Dalt. Justice*, 674. A *certiorari* is in the nature of a writ of error, and removes, in contemplation of law, the record itself. In practice, however, a transcript is only transmitted; yet by fiction of law it is always regarded as the record itself. 3 *Caine's Rep.*, 86.

A return to a *certiorari* ought, in all cases, to be made by the justice to whom it is directed, for, if made by any other person, the record is not thereby removed. 1 *Burn's Justice*, 331.

A *certiorari* only brings up the record of the cause, and not the evidence. 3 *Cowen's Rep.*, 16.

In Shotwell's case, 10 *Johns. Rep.*, 305, it was held that, where a *certiorari* is issued to a justice of the peace to return the proceedings, in case of forcible entry and detainer, and

the justice dies before any return is made, the court will hear and decide the case on motion and affidavits.

And in the case of Seymour *v.* Webster, 1 *Cowen's Rep.*, 168, which was tried before a justice of the peace, a writ of *certiorari* was served upon the justice, who died after the return day without having made a return. On motion to the court, it was ordered that the plaintiff in error have leave to bring on the argument of this cause at the next term, on the usual notice that the proceedings had before the justice be brought before the court on affidavits; that the plaintiff's serve on the defendant's attorney, and the defendant's attorney in like manner serve on the plaintiff's attorney, copies of the affidavits on which they respectively rely; and that the question of affirmance or reversal be argued on the facts contained in those affidavits.

It has been said that every return to a writ of *certiorari* ought to be under seal. 2 *Hawkins*, 294. There does not appear to be any express adjudication requiring this, and Mr. Hawkins does not seem to be recognized as authority, even in England, as to the inferior courts. 1 *Cowen's Rep.*, 212, *and note* (*b.*)

When a writ of *certiorari* has been served, the justice is bound to obey it and make return as therein required. Although awarded against law, its irregularity is none of his concern, for he cannot dispute the command of the superior court, which is a warrant to him. *Dalt. Justice*, 674.

A *certiorari* being delivered to a justice of the peace, is a *supersedeas* to all subsequent proceedings on the record. *Dalt. Justice*, 678.

A writ of *certiorari* served before execution, supersedes it, and if it has been issued before the writ is served, on notice thereof to the constable, he has no right to levy or do any thing under it. The constable, however, is not in contempt for proceeding until he has actual notice of the service. *Willes Rep.*, 271. But if the officer has begun the execution before the *certiorari* is served, as by making a levy, or arrest, the writ is no stay, and the execution may be completed. 9 *Johns. Rep.*, 66. Where the *certiorari* is served before the money, if collected on the execution, is paid over to the party, it seems that it ought to be paid to the justice, to abide the event of suit.

2. *By appeal.*

Appeals for the removal of causes from an inferior to a superior court for the purpose of obtaining new trials, are unknown to the common law, and can only be prosecuted where they are expressly given by statute. 1 *Scam. Rep.*, 511.

In taking the appeal, the parties should be careful in observing all the requirements of the statute, as this is a new and peculiar jurisdiction conferred upon the circuit court for the transferring of suits originally commenced before justices of

the peace into that court, and rests only upon a strict compliance therewith. Should there be any irregularity, the appeal would be dismissed upon motion, unless the proceedings should be amended, which occasions delay, and is attended with expense, and is sometimes impracticable.

Gale's Stat., 409. "SEC. 31. When either party shall desire to appeal from the judgment of a justice of the peace, such party shall receive from the justice a copy of the judgment from which he wishes to appeal, and shall produce the same to the clerk of the circuit court of the proper county; and the said party shall, within twenty days from the date of the said judgment, enter into bond in the office of said clerk, in a penal sum sufficient to cover said judgment and all costs, with security, to be approved by said clerk; which bond shall be conditioned to pay the debt and costs in case the judgment shall be affirmed on the trial of said appeal; and if, upon the trial of any appeal, the bond required to be given by this section, shall be adjudged informal, or otherwise insufficient, the party who executed such bond shall in no wise be prejudiced by reason of such informality or insufficiency: *Provided*, he will, in a reasonable time, to be fixed by the court, execute and file in said court a good and sufficient bond."

By sec. 1 of an act entitled "An act to amend the several laws in relation to appeals," passed February 3, 1840, it is provided "That appeals from judgments of justices of the peace to the circuit court, shall be granted in all cases except on judgment confessed: *Provided*, The party praying for an appeal shall, within twenty days from the rendering of the judgment from which he desires to take an appeal, enter into bond into the office of said justice of the peace, with security to be approved by the justice conditioned that the appellant will pay and satisfy whatever judgment may be rendered by the circuit court upon dismissal or trial of the appeal." *Sess. Laws*, 1840, *p.* 108.

Appeals shall, hereafter, be allowed from all judgments of justices of the peace rendered in *qui tam* actions and suits instituted to recover penalties and forfeitures which are or may be allowed by any statutes of the state, such appeals to be taken and proceeded in, in all respects as is or may be required in appeals from judgments of justices of the peace in civil actions. *Gale's Stat.*, 183.

But where the parties to a suit pending before a justice of the peace refer the difference between them to arbitrators mutually chosen by them, it has been held that they are bound by the decision of the arbitrators, and cannot appeal from the judgment rendered by the justice upon the award. 2 *Scam. Rep.*, 488.

Sess. Laws of 1840, *p.* 109. "SEC. 3. Where a bond shall be executed by the appellant as aforesaid, the justice who gave the judgment, and if execution or other process has been is-

sued thereon, said justice shall recall the same, and all further proceedings thereon shall be suspended, and the said justice shall, within twenty days after receiving and approving of the appeal bond, file the same in the office of the clerk of the circuit court, together with all the papers and transcript of the judgment he had given, with a certificate under his hand, that the said transcript and papers contain a full and perfect statement of all the proceedings before him; and the court shall hear and determine the said appeal in a summary way, without pleading in writing, according to the justice of the case."

"SEC. 5. Parties to suits before justices of the peace, may take appeals from their decisions before the clerks of the circuit courts in the same manner as is now provided by law, or they may appeal as provided in the foregoing sections."

Where a bond was written by the clerk and handed to the appellants to be signed by them and their sureties, which was accordingly done, (though not in the office,) and the bond lodged in the office with the clerk, upon which he issued a summons and *supersedeas* to the justice: this was held a substantial compliance with the provision of the statute that requires the appeal bond to be entered into the office of the clerk and the security to be approved by him. 1 *Scam. Rep.*, 487.

Gale's Stat., 410. "SEC. 34. So soon as the clerk shall issue a *supersedeas* as aforesaid, the justice who gave the judgment, and any constable in whose hands an execution or other process may be, in relation thereto, shall suspend all further proceedings thereon; and the said justice shall return all the papers and a transcript of the judgment he had given, to the clerk of said court, with a certificate under his hand, that the said transcript and papers contain a full and perfect statement of all the proceedings before him; and the said court shall hear and determine the said appeal in a summary way, without pleading in writing, according to the justice of the case."

Sess. Laws, 1838–9, *p.* 291. "SEC. 2. One or more plaintiffs, or defendants, in causes decided by justices of the peace, shall be allowed the right of appeal to the circuit court, without the consent of the others; and when one of several appeals, the *supersedeas* shall issue directing a suspension of all further proceedings upon the judgment, as though all had joined in the appeal."

3. *By certiorari under the statute.*

Gale's Stat., 410. "SEC. 36. The judges of the circuit and probate courts shall have power within their respective jurisdictions, and it shall be their duty, upon application, made as hereinafter mentioned, to grant writs of *certiorari* to remove causes from before justices of the peace, into the circuit court, who shall endorse an order for the same, upon the petition of

the party praying such writ, and on producing the same to the clerk of the circuit court he shall issue said writ in conformity to the provisions of this act.

"Sec. 37. The petition, on application for writs of *certiorari*, shall set forth and shew upon the oath of the applicant that the judgment before the justice of the peace was not the result of negligence in the party praying such writ; that the judgment in his opinion is unjust and erroneous, setting forth wherein the injustice and error consist, and that it was not in the power of the party to take an appeal in the ordinary way, setting forth the particular circumstances which prevented him from so doing."

The statute allowing causes to be taken to the circuit court by *certiorari*, requires the petition for that purpose to set forth that the judgment complained of was not the result of negligence on the part of the petitioner, and that in his opinion it is unjust; setting forth wherein the injustice consists. It must also allege that it was not in the power of the party to take an appeal in the ordinary way, and set forth particularly the circumstances that prevented him from so doing. Absence from the county, and ignorance of the rendition of a judgment by a justice of the peace against a plaintiff, upon a note lodged with the justice for collection, are not sufficient excuses for not taking an appeal in the ordinary way, and do not authorize the allowance of a writ of *certiorari*. 1 *Scam. Rep.*, 565.

"Sec. 38. No writ of *certiorari* shall issue after the expiration of six months from the rendering of the judgment.

"Sec. 39. Before any writ of *certiorari* shall issue, the party applying therefor shall give bond, with security, in the same manner, and with the same conditions, and when the same shall be defective, may be perfected as bonds in cases of appeals from justices of the peace. The writ of *certiorari* shall require the justice to certify to the circuit court, a transcript of the judgment and other proceedings had before him; and in no case shall the justice be required to send up a minute or memorandum of the evidence given before him; but upon the return of said writ, such proceedings shall be had thereon, as in cases of appeals."

"Sec. 41. The justice of the peace, constable, and other persons concerned, shall, as soon as the writ of *certiorari* shall be served, stay all further proceedings in that case, until the further order of the circuit court."

A writ of *certiorari* to remove a cause from a justice of the peace to the circuit court, is given *by statute* in such cases only as appeals are given. 1 *Scam. Rep.*, 264.

CHAPTER XII.

FORMS OF PROCEEDINGS IN JUSTICES' COURTS.

Summons in debt or assumpsit.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of said county:

You are hereby commanded to summon A. B. to appear before me, at on the day of at o'clock, to answer the complaint of C. D. for a failure to pay him a certain demand not exceeding one hnndred dollars; and thereof make due return as the law directs.

Given under my hand and seal, this day of 18

John Doe, [L. S.]
Justice of the peace.

Summons and notice to appear and testify.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of said county:

You are hereby commanded to summon C. D. to appear before me, at my office in in said county, on the day of 18 at the hour of o'clock, A. M., to answer the complaint of A. B. for a failure to pay him a certain demand not exceeding one hundred dollars, and hereof make due return as the law directs. The said defendant is hereby also notified that the said plaintiff says that he has no witness by whom to prove his demand, except it be by his own oath, or the oath of the said defendant; and unless the said defendant appear at the trial of said complaint, the plaintiff will be permitted to prove his demand by his own oath, as by law is directed in such cases.

Given under my hand and seal at my office in in said county, this day of A. D. 18

E. F., [L. S.]
Justice of the peace.

Summons in debt on statute.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county, Greeting:

You are hereby commanded to summon *John Doe* to appear before the undersigned, a justice of the peace of the said

county, at his office in *Ottawa*, in said county, on the *sixth* day of *instant*, at o'clock in the noon, to answer the county commissioners of *La Salle* county, on the relation of *James Law*, supervisor of road district number in said county, of a plea of debt for one hundred dollars on statute, to wit: "An act concerning public roads, approved Feb. 20, 1841," to his damage one hundred dollars. And have you then and there this precept.

Given under the hand and seal of the said justice, this day of 18 J. P. [L. S.]

The above form may be varied to suit any case for the recovery of a penalty given by statute.

Summons against constable, &c., and securities.

State of Illinois, }
county, } ss. The people of the state of Illinois, to any constable of said county, Greeting:

You are hereby commanded to summon A. B., C. D., and E. F. to appear before me at on the day of next, to answer the complaint of G. H. for a failure of the said A. B. to pay to the said G. H. a certain sum of money not exceeding one hundred dollars, collected by the said A. B. as constable for the said G. H., and hereof make due return as the law directs.

Given under my hand and seal, this day of 18
J. P. [L. S.]
Justice of the peace.

Summons in trespass.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of said county, Greeting:

You are hereby commanded to summon *John Doe* to appear before the undersigned, a justice of the peace of said county, at his office in *Ottawa*, in said county, on the day of *instant*, (or next,) at o'clock in the noon, to answer *James Kerr* of a plea of trespass on personal property, to the damage of the said *James Kerr* twenty dollars. And have you then and there this precept.

Given under the hand and seal of the said justice, this day of 18 J. P. [L. S.]

Summons in trover.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of said county, Greeting:

You are hereby commanded to summon *John Doe* to appear before the undersigned, a justice of the peace of said county, at his office in *Ottawa*, in said county, on the day of *instant*, (or next,) at o'clock in the noon, to answer *James Kerr* of a plea of trespass on the case for converting and disposing of the goods and chattels of the said *James Kerr* to his damage twenty dollars. And have you then and there this precept.

Given under the hand and seal of the said justice, this day of 18 J. P. [L. S.]

Form of affidavit for garnishee process on judgment.

State of Illinois, } ss.
La Salle county, }

James Kerr v. *John Doe*, } Before *Thomas Larkin*, justice of the peace:

James Kerr, the plaintiff in the above entitled suit, being sworn, on oath says, that he lately recovered a judgment in said suit before *Thomas Larkin*, a justice of the peace of said county, against said *John Doe*, for the sum of dollars debt (or damages) and dollars costs; that an execution has been lately issued on said judgment and returned by a constable of said county, no property found; that the said *John Doe* has no property within deponent's knowledge in his possession liable to execution; that deponent has just reason to believe and does believe that one C. D. is indebted to the said *John Doe*, (or "that C. D. hath effects of the said *John Doe* in his hands.") *James Kerr*.

Subscribed and sworn to before *Thomas Lakin*, justice of the peace of said county, this day of 18

Form of summons in the above case.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of said county, Greeting:

Whereas, *James Kerr* hath this day made oath before the undersigned, a justice of the peace of said county, that he lately recovered a judgment before *Thomas Larkin*, a justice of the peace of said county, against the said *John Doe*, for the sum of dollars debt (or damages) and costs; that an execution has been lately issued on said judgment and returned by a constable of said county, no property found; that said *John Doe* has no property within deponent's knowledge in his possession liable to execution; that deponent has just reason to believe and does believe that one C. D. is indebted to the said *John Doe*, (or

"that C. D. hath effects of the said *John Doe* in his hands:")

Now, therefore, we command you that you summon the said C. D. to appear forthwith as garnishee before the undersigned, at his office in *Ottawa*, in said county, to answer what may be then and there objected against him.

Given under the hand and seal of the said *Thomas Larkin*, justice of the peace, this day of 18

Thomas Larkin. [L. S.]

Summons or scire facias against bail.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county, Greeting:

You are hereby commanded to summon to appear before me, at on the day of at o'clock, to show cause, if any he have, why judgment should not be rendered against him, as the special bail of upon a *capias* issued by me against him, in favor of for the sum of dollars and cents, the amount of the judgment rendered against the said in favor of the said and hereof make due return, as the law directs.

Given under my hand and seal, this day of 18

John Doe, [L. S.]
Justice of the peace.

Capias in debt or assumpsit.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county, Greeting:

You are hereby commanded to take the body of and bring him forthwith before me, unless special bail be entered; and if such bail be entered, you will then command him to appear before me, at on the day of at o'clock, to answer the complaint of A. B. for a failure to pay him a certain demand not exceeding one hundred dollars; and hereof make due return as the law directs.

Given under my hand and seal this day of 18

John Doe, [L. S.]
Justice of the peace.

Capias in trespass.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county, Greeting:

You are hereby commanded to take the body of *John Doe* and bring him forthwith before *Thomas Larkin*, a justice of the peace of the said county, at his office in *Ottawa*, in said coun-

ty, unless special bail be entered; and if special bail be entered, you will then command him to appear before the said justice at his said office, on the day of *instant*, at o'clock in the noon, to answer *James Kerr* of a plea of trespass on personal property, to his damage twenty dollars: and hereof make due return as the law directs.

Given under the hand and seal of the said justice, this day of 18 *Thomas Larkin*, [L. S.]
Justice of the peace.

In trover. "Of a plea of trespass on the case for converting and disposing of the goods and chattels of the said *James Kerr*."

Endorsement on summons or warrant.

Sum demanded by plaintiff, - - - - - $25 00
Justice's costs, - - - - - - - - ——
Constables costs, - - - - - - - - ——

Special bail piece.

I, *Thomas Nokes*, acknowledge myself special bail for the within named *John Doe*.

Witness, my hand, this day of 18
Thomas Nokes.

I approve of *Thomas Nokes* as special bail in the within suit, Aug. 1st, 1842. *Jesse Danforth*, Constable.

Affidavit for an attachment.

State of Illinois, }
La Salle county, } ss. A. B. of *Ottawa*, in said county, being duly sworn, deposes and says, that E. F., against whom the said A. B. is about to sue out an attachment, is justly indebted to him in the sum of dollars.

This deponent further says, that the said E. F. so conceals himself that civil process cannot be served upon him, (or "that the said E. F. so absconds that civil process cannot be served upon him;" or "that on the day of 18 a warrant for the arrest of the said E. F. for the debt aforesaid, was, upon the application on oath of this deponent, duly issued by one then a justice of the peace of said county, and placed in the hands of one then a constable of said county, to be served; and that the said E. F. stands in defiance of the said constable so that said warrant cannot be served;" or "that the said E. F is not a resident of the state

of Illinois, but, as this deponent believes, resides in the state of Ohio.") A. B.

Subscribed and sworn to before me, this day of 18
C. D.
Justice of the peace.

Form of a bond for an attachment.

Know all men by these presents, that we, A. B. and G. H., are held and firmly bound unto E. F. in the sum of dollars, to be paid to the said E. F. or to his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated, the day of 18

The condition of the above obligation is such that, whereas the above bounden A. B. hath, on the day of the date hereof, prayed an attachment at the suit of himself against the personal estate of the above named E. F., for the sum of dollars, and the same being about to be sued out, returnable on the day of 18 before C. D., a justice of the peace of the county of *La Salle*, and state of Illinois. Now if the said A. B. shall prosecute his suit with effect, or in case of failure therein, shall well and truly pay and satisy the said E. F. all such costs in such suit, and such damages as the said E. F. may sustain, by reason of wrongfully suing out the said attachment then, the above obligation to be void, else to remain in full force and virtue. Witness, our hands and seals, this day of 18

A. B. [L. S.]
G. H. [L. S.]

Form of attachment.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county, Greeting:

Whereas, A. B. (or "agent" or "attorney of A. B.," as the case may be) hath complained on oath (or "affirmation") before C. D., a justice of the peace in and for said county, that E. F. is justly indebted to the said A. B. in the amount of dollars; and oath (or "affirmation") having been also made that the said E. F. so absconds or conceals himself, or stands in defiance of a peace officer authorized to arrest him with civil process, so that the ordinary process of law cannot be served on him; and the said A. B. having given bond and security according to the direction of the act in such case made and provided: We, therefore, command you that you attach so much of the personal estate of the said E. F. to

be found in your county as shall be of value sufficient to satisfy the said debt and costs, according to the complaint, and such personal estate so attached, in your hands to secure, or so to provide that the same may be liable to further proceedings thereon, according to law, before the undersigned, justice of the peace; and, in case personal property of value sufficient cannot be found, that you summon all persons whom the plaintiff or his agent shall direct, or appear before said justice, on the day of *next*, then and there to answer what may be objected against him or them, when and where you shall make known how you have executed this writ; and have you then and there this writ.

Given under my hand and seal, the day of 18

C. D. [L. S.]
Justice of the peace.

Notice when attachment is not personally served.

Justice's court:

James Kerr v. *John Doe.* } NOTICE.

To the above named defendant:

You are hereby notified that an attachment has been issued by the undersigned, a justice of the peace in and for the county of *La Salle*, at the instance of *James Kerr*, the above named plaintiff, against your personal property; that the said attachment was issued for the sum of fifty dollars, which amount the said plaintiff claims to be due to him from you; that the cause will be tried before me at my office in *Ottawa*, in said county, on the *twentieth* day of *August*, *instant;* and that, unless you shall appear at the time and place fixed for trial, judgment will be entered by default, and the property attached ordered to be sold to satisfy the same.

Dated, *August* 10*th*, 18 C. D.
Justice of the peace.

Return on notice.

On the day of *August*, *instant*, I posted three copies of the within notice at three public places in the neighborhood of the within named justice.

Dated, 14th, 18 Constable.

Attachments against boats and vessels.

The act authorizing the seizure of boats and other vessels by attachment in certain cases, approved, Feb. 13, 1833, refers to and adopts the mode of proceeding pointed out in the "Act concerning attachments," approved Feb. 12, 1833. That the act approved on the 13th of Feb. refers to that ap-

proved on the 12th, and to that alone, is apparent because that of the 12th repeals all other laws on the subject.

Sections five and thirty-one of the act of the 12th of Feb., were the only ones on the subject of attachments from justices of the peace, and it is undoubtedly to these that the legislature referred; and, although these two sections have been subsequently repealed, yet it is presumed that, inasmuch as they have been adopted and made part of the act authorizing the seizure of boats, &c., they are still in force as a part of that act. Unless this be so, the jurisdiction of the justice as to the amount, the kind of affidavit and bond, the time of the return of the attachment, and the manner of proceeding generally, cannot be ascertained.

The fifth section of the act of the 12th of Feb., provides that the creditor, his, her, or their agent shall make oath of an indebtedness not exceeding fifty dollars; that the justice shall take bond and security as directed in another part of said act; that he shall grant an attachment directed to a constable; and that the constable shall proceed thereon in all respects, when necessary, as upon an attachment returnable to any court of record, under said act.

The 31st sec. is as follows: "Attachments issued by justices of the peace shall be returnable within thirty days from their date; and the plaintiff in such attachment shall cause to be posted up, written, or printed notices thereof, when levied, in four of the most public places in the county, at least twenty days before the return of the attachment."

These two sections may be found in the Revised Laws, page 84 and 94. They are not printed in Gale's Statute.

Affidavit for an attachment against a boat or vessel.

State of Illinois, }
La Salle county, } ss. A. B. of *Ottawa*, in said county, being duly sworn, says that, on the day of 18 at in said county, he made a contract with C. D., then the master of the steam boat to furnish for the said boat certain materials towards repairing the said boat, and, in pursuance of said contract, did furnish the same; and that the said master contracted and agreed on his part to pay him therefor the sum of dollars, which said sum is still due and unpaid; and that he does not know whether the said boat is owned by copartners, nor does he know who are the owners thereof. He, therefore, prays an attachment against said steam boat by her name, authorizing and directing the seizure and detention of the same, with her engine, machinery, apparel, and furniture.

Subscribed and sworn to before me, *Jabez Fitch*, a justice of the peace of said county, this day of 18 *Jabez Fitch*, Justice of the peace. A. B.

Bond for an attachment against a boat or other vessel.

Know all men by these presents, that we, A. B. and C. D., of the county of *La Salle*, and state of Illinois, are held and firmly bound unto the people of the state of Illinois, for the use and benefit of the owner or owners of the steam boat in the sum of (insert double the sum for which the complaint is made) to be paid to said people of the state of Illinois for the use aforesaid; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly, by these presents. Sealed with our seals, and dated this day of 18

Whereas, the above bounden A. B. hath, on the day of the date hereof, prayed an attachment in favor of said A. B., against the steam boat with her engine, machinery, apparel, and furniture, the owners of which are unknown, for the sum of dollars, and the same being about to be sued out, returnable on the day of *instant*, (next,) before *Jabez Fitch*, a justice of the peace of *La Salle* county:

Now, therefore, the condition of this obligation is such, that if the said A. B. shall prosecute his suit with effect, or, in case of failure therein, shall well and truly pay and satisfy all such costs in said suit and such damages as shall be awarded against the said A. B., his heirs, executors, or administrators, in any suit or suits which may hereafter be brought for wrongfully suing out the said attachment, then the above obligation to be void, otherwise to remain in full force and effect.

Sealed and delivered in the presence of } A. B. [L. S.] C. D. [L. S.]

Attachment against a boat or vessel.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of said county, Greeting:

Whereas, A. B. hath this day complained on oath, that, on the day of 18 he made a contract with C. D., then the master of the steam boat to furnish, for the said boat, certain materials towards repairing the said boat, and, in pursuance of said contract, did furnish the same; and that the said master contracted and agreed on his part to pay him therefor the sum of dollars, which said sum is still due and unpaid; and that he did not know whether the said boat was owned by co-partners, nor did he know who were the owners thereof: And whereas, the said A. B. thereupon made application to me, the undersigned, a justice of the peace of said county, for an attachment for said sum of dollars, against said steam boat by her name, authorizing and directing the seizure and detention of the same, with her en-

gine, machinery, apparel, and furniture, and gave bond and security according to the directions of the statute in such case made and provided:

We, therefore, command you that you attach the said steam boat with her engine, machinery, apparel, and furniture, if to be found in your county, and detain the same, so that they may be liable to further proceedings thereon according to law, before the undersigned, a justice of the peace, at his office in *Ottawa*, in said county, on the day of *instant*, (or next,) at o'clock in the noon, when and where you shall make known to the said justice of the peace how you have executed this writ. And have you then and there this precept.

Given under the hand and seal of said justice, this day of 18 *Jabez Fitch*, [L. S.]
Justice of the peace.

Notice of an attachment against a boat or vessel.

ATTACHMENT NOTICE.

By virtue of an attachment issued by *Jabez Fitch*, a justice of the peace of the county of *La Salle*, against the steam boat and her engine, machinery, apparel, and furniture, in favor of A. B., for the sum of dollars, to me directed and delivered, I did, on this day of 18 seize the said steam boat, engine, machinery, apparel, and furniture, and now have the same in my possession to be detained so that they may be liable to further proceedings thereon according to law, before the said *Jabez Fitch*, at his office in *Ottawa*, in said county, on the day of *instant*, (or next,) at o'clock in the noon.
L. M.
Constable.

Form of affidavit against the owners of a vessel.

State of Illinois, }
Cook county, } ss. A. B., of *Chicago*, in the said county, being duly sworn, deposes and says, that C. D., E. F., and G. H., the owners of the schooner are justly indebted to him in the sum of dollars, for work done upon said schooner and for materials furnished for the same by this deponent, at the request of I. J., the master of said schooner.
A. B.

Subscribed and sworn before L. M., a justice of the peace of said county, this day of 18 L. M.
Justice of the peace.

Bond for an attachment against the owners of a vessel.

Know all men by these presents, that we, A. B. and K. L., of the county of *Cook* and state of Illinois, are held and firmly bound unto C. D., E. F., and G. H., in the sum of (insert double the sum for which the complaint is made,) to be paid to the said C. D., E. F., and G. H., their executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly, by these presents. Sealed with our seals, and dated this day of 18

Whereas, the above bounden A. B. hath, on the day of the date hereof, prayed for an attachment in favor of said A. B. against the said C D., E. F., and G. H., for the sum of dollars, authorizing and directing the seizure and detention of the schooner with her sails, rigging, tackle, apparel, and furniture, and the same being about to be sued out, returnable on the day of *instant*, (or next,) before L. M., a justice of the peace of the county of *Cook*:

Now, therefore, the condition of this obligation is such, that if the said A. B. shall prosecute his suit with effect, or in case of failure therein, shall well and truly pay and satisfy to the said C. D., E. F., and G. H., all such costs in said suit, and such damages as shall be awarded against the said A. B., his heirs, executors, or administrators, in any suit or suits which may hereafter be brought for wrongfully suing out the said attachment, then the above obligation to be void, otherwise to remain in full force and effect.

Sealed and delivered in the presence of } A. B. [L. S.] K. L. [L. S.]

Attachment against the owners of a boat or vessel.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county, Greeting:

Whereas, A. B. hath this day complained on oath that C. D., E. F., and G. H., the owners of the schooner were justly indebted to him in the sum of dollars, for work done upon said schooner and for materials furnished for the same by this deponent, at the request of I. J., the master of said schooner:

We, therefore, command you that you attach the said schooner, with her sails, rigging, tackle, apparel, and furniture, if to be found in your county, and detain the same so that they may be liable to further proceedings thereon according to law, before the undersigned, a justice of the peace, on the day of *instant*, (or next,) at o'clock in the noon, at his office in *Chicago*, in said county, when and where you shall make known to the said justice of the peace how

you have executed this writ. And have you then and there this precept.

Given under the hand and seal of the said justice, this day of 18 L. M. [L. S.]
Justice of the peace.

Notice of an attachment against the owners of a boat or vessel.

ATTACHMENT NOTICE.

By virtue of an attachment, issued by L. M., a justice of the peace of the county of *Cook*, against C. D., E. F., and G. H., in favor of A. B., for the sum of dollars, to me directed and delivered, I did, on this day of 18 seize the schooner with her sails, rigging, tackle, apparel, and furniture, and now have the same in my possession, to be detained so that they may be liable to further proceedings thereon according to law, before the said L. M., at his office in *Chicago*, in said county, on the day of *instant*, (or next,) at o'clock on the noon.
R. S., Constable.

Declaration or statement in attachment against boats or vessels.

State of Illinois, }
La Salle county, } ss. Before a justice of the peace of said county:

A. B.
v. } Attachment:
The steam boat ——— }

The steam boat was attached in this case at the suit of A. B. the plaintiff, and thereupon the said plaintiff complains of said steam boat, for that whereas, on the day of 18 at said county, the said steam boat was indebted to the plaintiff in the sum of dollars, for the work and labor of the plaintiff, before that time done, performed, and bestowed in and about the repairing of the said steam boat, at the request of one C. D., then the master thereof; which said demand remains wholly unpaid: the plaintiff further avers that he does not know who are the owners of said boat.
A. B.
Plaintiff.

Bill of particulars.

1844.	The steam boat to	Dr.
Jan. 1*st.*	To ten days labor in painting said boat, at $ per day, - - - - -	$

Another form in attachment against owners.

State of Illinois, }
La Salle county, } ss. Before a justice of the peace, of said county :

A. B.
v. } Attachment.
C. D., E. F., and G. H.

C. D., E. F., and G. H., the defendants, were attached in this case at the suit of A. B. the plaintiff, and thereupon the said plaintiff complains, for that whereas, on the day of 18 at the said county, the said C. D., E. F., and G. H. were indebted to the plaintiff in the sum of dollars for certain firewood and materials before that time furnished by the plaintiff to the defendants, to be used in and about the repairing, furnishing, and fitting the steam boat at the request of the said defendants ; which demand now remains wholly unpaid.

A. B.
Plaintiff.

Bill of particulars.

1844.	C. D., E. F., and G. H. owners of the steam boat to	Dr.
Jan. 1*st.*	To 1000 feet of pine lumber, - -	$———
" "	To 1 doz. common chairs, - - -	———
" "	To 10 cords of wood at $ per cord,	———

Deputation of constable pro tem. to serve attachment.

State of Illinois, }
La Salle county, } ss. It being made to appear to the undersigned, a justice of the peace of said county, that there is a probability that the goods and chattels of the within named defendant will be removed before application can be made to a qualified constable to execute the within attachment, he therefore appoints *Richard Fen* to execute this precept.

Witness, the hand and seal of the said justice, this day of 18 *Ebenezer Neff*, [L. S.]
Justice of the peace.

Form of security by a non-resident.

State of Illinois, }
La Salle county, } ss.

James Kerr
v. } Demand, $
John Doe.

I, *Thomas Nokes*, do enter myself security for all costs that may accrue in the above case, this day of 18 *Thomas Nokes.*

Form of security for costs by next friend.

State of Illinois, }
La Salle county, } ss. A. B., of the said county, a minor under the age of twenty-one years, having selected me, the subscriber, as his next friend, by whom to bring suit against C. D. before L. M., Esquire, a justice of the peace in and for said county, therefore I do hereby acknowledge myself bound for all the costs that may accrue and legally devolve on such minor in said suit.

Dated this day of 18 E. F.

Form of recognizance on claiming lands.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 *John Doe*, of *Ottawa*, in said county, and *Henry Marks* and *Peter Johnson*, of the same place, personally come before me, L. M., Esquire, a justice of the peace of the said county, and severally and respectively acknowledge themselves to be indebted to *James Kerr*, that is to say, the said *John Doe* in the sum of *one hundred* dollars, and said *Henry Marks* and *Peter Johnson* in the sum of *fifty* dollars each, to be levied of their respective goods and chattels, lands and tenements, to the use of the said *James Kerr*, if the said *John Doe* shall make default in the condition following:

Whereas, in an action of debt on the "Act to prevent trespassing by cutting timber," approved Feb. 27, 1819, before L. M., Esquire, a justice of the peace of the county of *La Salle*, in which the above named *James Kerr* is plaintiff, and the above bounden *John Doe*, defendant, the said *John Doe* sets up title to the following described tract of land, to wit: (Describe the land;) upon which it is alleged by the said plaintiff, that the said defendant has cut certain trees, (or as the case may be:)

Now, the condition of this recognizance is such, that, if the said *John Doe* shall prosecute his claim or title to the said land to effect within one year, or appear and defend an action to be instituted against him within one year, under, and by virtue of, the provisions contained in an act entitled "An act to prevent trespassing by cutting timber," in any court of record within this state having cognizance thereof, and, in either case, will abide by and satisfy the judgment that may be given in such court, then this recognizance to be void, otherwise to remain in full force.

Taken, subscribed, and acknowledged, the day of 18 before me, L. M. Justice of the peace.

John Doe, [L. S.]
Henry Marks, [L. S.]
Peter Johnson. [L. S.]

Subpœna.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to C. D.:

You are hereby commanded to appear before the undersigned, a justice of the peace in and for the said county, at his office in *Ottawa*, in the said county, on the day of *instant*, at o'clock in the noon, then and there to testify to the truth in a matter in suit, wherein *James Kerr* is plaintiff, and *John Doe* is defendant; and this you are not to omit under the penalty of the law.

Given under the hand and seal of the said justice, this day of 18 L. M. [L. S.]
Justice of the peace.

Subpœna duces tecum.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to C. D.:

You are hereby commanded to appear before the undersigned, a justice of the peace in and for the said county, at his office in *Ottawa*, in said county, on the day of *instant*, at o'clock in the noon, to testify the truth in a matter in suit, wherein *James Kerr* is plaintiff, and *John Doe* is defendant; and that you then and there bring with you, and produce at the time and place aforesaid, to be used as evidence, *a certain execution bearing date* (describe the document;) and this you are not to omit under the penalty of the law.

Given under the hand and seal of the said justice, this day of 18 L. M. [L. S.]
Justice of the peace.

Subpœna on reference to arbitrators.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to R. S.:

You are hereby commanded to appear before A. B., C. D., and E. F., at the dwelling house of the said A. B. in *Ottawa*, in the said county, on the day of *instant*, at o'clock in the noon, to testify the truth in a matter in suit, now depending before L. M., Esquire, a justice of the peace in and for the county of *La Salle*, wherein *James Kerr* is plaintiff, and *John Doe* is defendant, on the part of *James Kerr*; and that day to be tried before the said A. B., C. D., and E. F., arbitrators for that purpose mutually chosen by the said par-

ties; and this you are not to omit under the penalty of the law.

Given under the hand and seal of the said justice, this day of 18 L. M. [L. S.]
Justice of the peace.

Attachment against a defaulting witness.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county, Greeting:

We command you to attach *George Stone*, if he may be found in your county, and bring him forthwith (or "on the day of *instant*, at o'clock in the noon,) before *William Sly*, Esquire, a justice of the peace in and for the said county, at his office in in said county, to answer unto us for certain trespasses and contempts against us in not obeying our writ of *subpœna*, commanding him to appear, on the day of 18 before the said justice, to testify in a suit then and there depending, to be tried between *James Kerr*, plaintiff, and *John Doe*, defendant, on the part of the plaintiff, (or "defendant.") And we further command you to detain him in your custody until he shall be discharged by said justice, or be further dealt with according to law.

Given under the hand and seal of the said justice, this day of 18 *William Sly*, [L. S.]
Justice of the peace.

Minutes of the conviction to be entered in the justice's docket.

State of Illinois, }
La Salle county, } ss. Be it remembered, that, on the day of 18 *George Stone* is convicted before me, *William Sly*, a justice of the peace of said county, for his non-attendance as a witness to testify in a suit depending before me, wherein *James Kerr* is plaintiff, and *John Doe* is defendant; it having been made to appear to me that he was duly subpœnaed to attend as a witness in said suit; and the said *George Stone* not having purged himself, when called upon by me to show cause why he should not be fined for the said contempt. I do, therefore, adjudge and determine that, for the said contempt, the said *George Stone* pay a fine of *five* dollars; and that he be imprisoned in the common jail of said county, until he pay the fine aforesaid, or until he be duly discharged according to law.

In witness whereof I have hereunto set my hand and seal, this day of 18 *William Sly*, [L. S.]
Justice of the peace.

Commitment of witness on neglecting to pay a fine for non-attendance.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of said county, and to the keeper of the common jail of said county, Greeting:

Whereas, *George Stone* has this day been convicted before me, *William Sly*, Esquire, a justice of the peace in and for the said county, for a contempt; for that the said *George Stone* was duly subpœnaed to appear and testify in a suit depending before the said justice, between *James Kerr*, plaintiff, and *John Doe*, defendant, on the day of 18 and failing so to attend, and he not having purged himself when called upon by me to show cause why he should not be fined for such contempt: and whereas, upon such conviction, the said justice did adjudge and determine that the said *George Stone* should pay a fine of *five* dollars, and be imprisoned in the common jail of the said county until he paid the said fine, or was discharged by due course of law: and whereas, the said *George Stone* has neglected to pay the said fine. We, therefore, command you, the said constable, to take the said *George Stone* and deliver him into the custody of the said keeper of the said jail. And you, the said keeper, are hereby required to receive the said *George Stone* into your custody in the said jail, and him there safely keep until he pay the said fine, or be discharged by due course of law. Hereof fail not.

Given under the hand and seal of the said justice, this day of 18 *William Sly*, [L. S.]
Justice of the peace.

The preceding forms of proceeding against defaulting witnesses will answer, with slight alterations, in case of jurors.

Form of commitment of a witness for refusing to be sworn, or for refusing to testify.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county, and to the keeper of the common jail of the said county, Greeting:

Whereas, on the trial of a cause before *Thomas Larkin*, Esquire, a justice of the peace of the said county, between *James Kerr*, plaintiff, and *John Doe*, defendant, *George Stone* being called as a witness on the part of the plaintiff, (or "defendant,") and being present, and admitting that he had been duly subpœnaed to attend the said trial as a witness on the part of the said plaintiff, (or "defendant," or "it being proved to me by the oath of the said plaintiff, *or 'defendant'*," or "by the oath of *John Sykes*," or "by the return of *Thomas*

Clark, one of the constables of said county, that the said *George Smith*, had been duly subpœnaed," &c.,) refused to be sworn as such witness in any form prescribed by law, (or "*George Smith* was called and sworn as a witness on the part of the said plaintiff, and, on his examination as such witness, the said *George Stone* was asked by the said plaintiff the pertinent and proper question, "whether he was acquainted with the handwriting of *John Doe?*" to which question the said *George Stone* refused to make an answer.)

And the said *James Kerr* having made oath before the said justice of the peace, that the testimony of the said *George Stone* was so far material that without it he could not safely proceed to the trial of said cause:

We, therefore, command you, the said constable, to take and deliver the said *George Stone* into the custody of the said keeper of the said jail. And you, the said keeper, are hereby requested to receive the said *George Stone* into your custody in the said jail, and him there safely keep until he shall submit to be sworn as such witness as aforesaid, and shall be discharged by due course of law, (or "until he shall submit to answer the said question so put to him by the said *James Kerr*, and be discharged by due course of law.") Hereof fail not at your peril.

Given under the hand and seal of the said justice, this day of 18 *Thomas Larkin*, [L. S.]
Justice of the peace.

Notice of taking deposition of witness residing in the county where suit is pending.

Justice's court:

James Kerr v. *John Doe.* } Before *Thomas Larkin*, justice of the peace:

It appearing satisfactorily to the undersigned, a justice of the peace of the county of *La Salle*, that *Henry Cole*, of said county, is a material witness for the plaintiff in the above entitled suit, now pending before him, and that, on account of his age, (or "sickness," or other cause,) he is unable to attend the trial. You are, therefore, notified that, on the day of *instant*, at o'clock in the noon, the deposition of the said *Henry Cole* will be taken by me (or "by *Ebenezer Neff*, Esquire, a justice of the peace of said county") in writing, at the residence of the said witness in *Mission* precinct, in said county, to be read in evidence on the trial of said cause.

Dated, the day of 18 *Thomas Larkin.*

To the plaintiff, (or "defendant.")

Deposition of a witness.

Justice's court:

James Kerr v. *John Doe.* } Before *Thomas Larkin*, Esquire, justice of the peace:

Deposition of *Henry Cole*, aged about years, a witness in the above entitled suit, taken by *Ebenezer Neff*, Esquire, a justice of the peace of the county of *La Salle*, on the day of 18 at the residence of the said witness in *Mission* precinct, in said county, in the presence of the said plaintiff and defendant, on the part of said plaintiff (or "defendant.")

La Salle county, ss.: *Henry Cole* being duly sworn, deposes and says, as follows, viz: (Signed.) *Henry Cole.*

La Salle county, ss.: I, the subscriber, a justice of the peace of the said county, do certify that the above deposition was taken by me at the time and place mentioned in the caption thereof; that the said witness was first duly sworn; and that the said deposition was carefully read to the witness and signed by him.

Dated, this day of 18 *Ebenezer Neff.*
Justice of the peace.

Notice to take the deposition of a witness residing out of the county in which suit is pending.

Justice's court:

James Kerr v. *John Doe.* } Before *Thomas Larkin*, justice of the peace:

Sir,

Take notice, that, on the day of *instant*, between the hours of in the morning and in the evening of the same day, and continuing from day to day if necessary, at the house of E. F., in precinct, in the county of *Kendall*, and state of Illinois, and before L. M., a justice of the peace of said county, I shall proceed to take the deposition of *Philip Everett*, of said county, to be read as evidence in the above entitled cause.

Dated, the day of 18 Yours, &c.
To *James Kerr*, *John Doe.*
Plaintiff in the above entitled suit.

Notice for taking out commission to examine a non-resident witness.

Justice's court:

James Kerr v. *John Doe.* } Before *Jabez Fitch*, Esquire, justice of the peace:

Sir,

Take notice that, on the day of *instant*, at o'clock in the noon, I will attend before the said justice, at his office in *Ottawa*, in the county of *La Salle*, for the purpose of suing out a commission directed to I. R., Esquire, a justice of the peace in and for the county of *Calhoun*, in the state of *Michigan*, (or to any judge of the county or any number of commissioners not exceeding three, naming them,) to take the deposition of *John Shaw*, a resident of the last mentioned place, on the annexed interrogatories, to be read in evidence on the trial of this cause, now depending before the said justice; when and where you may attend and file cross interrogatories.

Dated, this day of 18 Yours, &c.

To *John Doe.* *James Kerr.*

Interrogatories to be annexed to the commission.

Interrogatories to be administered to *John Shaw*, of the county of *Calhoun*, in the state of *Michigan*, a witness to be produced, sworn, and examined in a certain cause now depending before *Jabez Fitch*, a justice of the peace of the county of *La Salle*, and state of Illinois, wherein *James Kerr* is plaintiff, and *John Doe* is defendant, on the part and behalf of the said plaintiff, under and by virtue of the commission hereto annexed.

First. Do you know the parties, plaintiff and defendant, in the title of these interrogatories named, or either; and which of them; and how long have you known them respectively?

Second. &c.

Lastly. Do you know any other matter or thing touching the matter in question, that may tend to the benefit or advantage of the plaintiff? If yea, declare the same as fully and at large as if you had been particularly interrogated thereto.

Cross interrogatories.

Interrogatories to be administered to the said *John Shaw*, by way of cross examination. (State interrogatories as the circumstances of the case require.)

Form of commission.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to J. K., Esquire, a justice of the peace of the county of *Calhoun*, in the state of *Michigan*, (or "to I. J., judge," &c., or "to A. B., C. D., and E. F., commissioners," &c.)

Whereas, it appears to *Ebenezer Neff*, Esquire, one of the justices of the peace in and for the county of *La Salle*, that *John Shaw*, of *Calhoun* county, in the state of *Michigan*, is a material witness in a certain cause now depending before the said justice, between *James Kerr*, plaintiff, and *John Doe*, defendant:

Therefore we, in confidence of your prudence and fidelity, do by these presents appoint you to examine the said witness, and authorize and empower you, at a certain day and place to be by you for that purpose appointed, to examine on oath the said witness on all the interrogatories hereto annexed, to be taken before you, and cause such examination to be reduced to writing, and signed by such witness, and to certify and return the depositions annexed hereto to the said justice, under your seal, with the names of the parties endorsed thereon.

In witness whereof, the said justice has hereunto set his hand and seal, the day of 18

Thomas Larkin. [L. S.]

Caption of Deposition.

Deposition of *John Shaw*, of *Calhoun* county, in the state of *Michigan*, a witness, aged about years, produced, sworn, and examined before J. K., Esquire, a justice of the peace in and for the county and state aforesaid, on the day of 18 at the house of T. W., in said county, by virtue of a commission issued by *Ebenezer Neff*, a justice of the peace of the county of *La Salle*, in the state of Illinois, to me directed for the examination of the said *John Shaw*, a witness in a suit depending before the said justice, between *James Kerr*, plaintiff, and *John Doe*, defendant.

First. To the first interrogatory, this deponent says, &c.

Second. To the second interrogatory, this deponent says, &c.

The witness must make answer to each interogatory separately.

If there be any cross interrogatories, the witness will go on thus:

First. To the first cross interrogatory he says, &c.

(Signed.) *John Shaw.*

State of *Michigan*, }
Calhoun county, } ss.

I, the subscriber, a justice of the peace of said county, do certify, that the above deposition was taken by me at the time and place mentioned in the caption thereof; that the said witness was first duly sworn; and that the same was carefully read to said witness, and signed by him.

Dated this day of 18 J. K.

Form of venire.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county, Greeting:

We command you to summon lawful men of your county to appear before me, at on the day of 18 who are not of kin to *James Kerr*, plaintiff, or to *John Doe*, defendant, to make a jury between said parties, in a plea of because as well the said plaintiff as the said defendant have put themselves upon the country for trial; and have you then there the names of the jury and this writ.

Witness, my hand and seal, this day of 18

Jabez Fitch,
Justice of the peace.

Return to a venire.

Panel of jurors:
A. B., C. D., E. E., &c., &c.

By virtue of the within venire, I did, on the day of 18 summon the persons named in the above panel, as jurors, as within I am commanded. *Jesse Danforth*,
Constable.

Oath to witness on a principal challenge, or to the favor.

You do swear by the ever living God, that you will true answers make to such questions as shall be put to you touching the challenge now in question.

Jurors' oath or affirmation.

You and each of you do swear by the ever living God, (or "You and each of you do solemnly, sincerely, and truly declare and affirm,") that you will well and truly try the matter in difference between *James Kerr*, plaintiff, and *John Doe*, defendant, and, unless discharged by me, a true verdict give according to evidence.

Voire dire oath to a witness.

You do swear by the ever living God, that you will true answers make to such questions as shall be put to you touching your interest in the event of this suit.

Oath to a witness to prove the interest of another witness.

You do swear, in the presence of the ever living God, that you will true answers make to such questions as shall be put to you touching the interests of *John Gray*, in the event of this trial.

Oath or affirmation to a witness, generally or in chief.

You do swear, in the presence of Almighty God, (or, in case the witness does not lay his hand on and kiss the gospel, "by the ever living God," or "you do solemnly, sincerely, and truly declare and affirm,") that the evidence you shall give relative to the matter in difference between *James Kerr*, plaintiff, and *John Doe*, defendant, shall be the truth, the whole truth, and nothing but the truth.

Oath to the constable to keep the jury during adjournment.

You swear by the ever living God, that you will well and truly keep this jury, and will not speak to them yourself, nor suffer any person to speak to them touching any matter relative to this trial, and return with them upon my order.

Constable's oath on retiring with the jury to consider their verdict.

You do swear by the ever living God, that you will well and truly keep every person sworn on this jury in a private and convenient place, without meat or drink except water; that you will not suffer any person to speak to them, nor speak to them yourself, unless it be by my order, except it be to ask them whether they have agreed on their verdict.

Form of agreement to refer a suit to arbitrators.

Justice's court:

James Kerr v. *John Doe.* } Before *Thomas Larkin*, Esquire, a justice of the peace:

We, the subscribers, the parties named in the above entitled suit, do hereby agree to refer the matter in difference be-

tween us in said suit, to A. B., C. D., and E. F., arbitrators mutually chosen by us.

Dated this day of 18 *James Kerr*,
John Doe.

Notice to arbitrators.

Justice's court:

James Kerr v. *John Doe.* } Before *Thomas Larkin*, Esquire, a justice of the peace:

To A. B., C. D., and E. F.:

GENT.: You will please to take notice, that the parties to the above entitled suit have mutually referred the difference between them in said suit to you as arbitrators. You will, therefore, proceed and examine the matter in controversy between the said parties, and make out your award thereon in writing, and deliver the same to me.

Dated this day of 18 *Thomas Larkin*,
Justice of the peace.

Notice to parties.

Justice's court:

James Kerr v. *John Doe.* } Before *Thomas Larkin*, Esquire, justice of the peace:

To *James Kerr:*

SIR: We, the undersigned, arbitrators, to whom the difference between the parties to the above entitled suit has been referred, will proceed to hear and determine the same, on the day of 18 at o'clock in the noon, at the office of *Jabez Fitch*, in *Ottawa*, in said county.

Dated, the day of 18 A. B.
C. D.
E. F.

A copy should be served on each party.

Form of award of arbitrators.

Justice's court:

James Kerr v. *John Doe.* } Before *Thomas Larkin*, Esquire:

The matters in difference between the parties to the above entitled suit having been referred to the subscribers, arbitrators mutually chosen by them to examine the matter in controversy in said suit, and make out their award thereon in writing and deliver the same to the said justice; and they,

having heard the proofs and allegations of the parties, and having considered the same, do award, adjudge, and determine, that there is due from the defendant to the plaintiff the sum of dollars; and that the said defendant pay the said sum to the said plaintiff and the costs.

In witness whereof, we have hereunto set our hands, this day of 18

A. B.
C. D.
E. F.

Entry on justice's docket.

George Stone }
v.
John Doe. } 1845. *January* 1. Summons issued, returnable 7 *January, instant*, at 1 o'clock, P. M.

Sum demanded, $50.00
Costs due, 37½

Jan. 2. Personally served by reading to the defendant, by *T. J. True*, constable. Fees, 50

Jan. 7. Parties appeared and joined issue. Plaintiff declares in assumpsit on a promissory note made by defendant to him, dated *January* 1, 1844, for $25.00, payable twenty days after date, with interest; and for goods sold and delivered, and claims $50.00

Bill of particulars filed.

Defendant pleads the general issue, and gives notice of set-off of an account for money paid and for work and labor done.

Bill of particulars filed.

On motion and oath of plaintiff, cause continued to 17th *inst.*, at *two* o'clock, P. M.

Jan. 15. Venire issued at the plaintiff's request returnable the 17th *inst.*, at *two* o'clock, P. M.

One subpœna issued on the part of the plaintiff.

Two subpœnas issued on the part of the defendant.

1845. *Jan.* 17. Parties appear and proceed to trial of the cause. The venire returned by *T. J. True*, constable, with the following panel of jurors, viz:

Ezra Hall, Peter Butts, William Cox, John Flinn, Peleg Smith, and

PLAINTIFF'S COSTS.

Justice's fees.

Issuing summons,	18¾
Docketing suit,	12½
Oath for continuance,	6¼
Continuance,	12½
Venire,	25
One subpœna,	18¾
Swearing jury,	37½
Swearing two witnesses,	12½
Swearing constable to attend jury,	6¼
Entering judgment,	26
Execution,	25
Jurors' fees,	1.50

Constable's fees.

Serving summons, and returning,	25
Mileage on same, five miles,	25
Serving venire,	50
Serving and returning one subpœna,	12½
Mileage on the same, five miles,	25
Attending trial,	25
Witnesses' fees.	1.00
	$6.12½

DEFENDANT'S COSTS.

Justice's fees.

Issuing two subpœnas,	37½
Swearing two witnesses,	12½

Constable's fees.

Serving and returning two subpœnas,	25
Mileage on the same, five miles,	25
Witnesses' fees.	1.00
	$2.00

Ariel Tubbs, who appeared and were sworn to try the cause.

Abram Brown and *Moses Hollet* sworn as witnesses for the plaintiff. *William Bond* and *Sykes Rice* sworn as witneses on the part of the defendant. *George Davis* was offered as a witness on the part of the defendant, and objected to by the plaintiff on the ground of interest, and rejected.

All of said witnesses claimed fees, (or as the case may be.)

After hearing the testimony the jury retire under the charge of *T. J. True*, constable, sworn for that purpose; and return into court and say, they find a verdict for the plaintiff for fifty dollars.

It is, therefore, considered that the plaintiff have and recover of the defendant said sum of fifty dollars, for his damages; and, also, the sum of six dollars and twelve and a half cents for his costs and charges by him about his suit expended; and that he have execution therefor.

Damages, - - - - - - - - -	$50 00
Costs, - - - - - - - - - -	6 12½
	$56 12½

The justice should make a minute of every thing that transpires in the suit in its proper order.

When a transcript is desired by either party, or by any other person, to be used in evidence, the justice will make a complete copy of the above entries, and certify the same.

Form of certificate.

State of Illinois, }
La Salle county, } ss. I, the subscriber, a justice of the peace in and for the said county, do certify the above to be a full and perfect copy of the proceedings and judgment, from my docket, in the above entitled cause.

Dated this day of 18 *Thomas Larkin.* [L.S.]

Certificate of county commissioners' clerk.

State of Illinois, }
La Salle county, } ss. I, *Maurice Murphy*, clerk of the county commissioners' court of the said county, do hereby certify, that, on the day of 18 and from that time till the day of 18 (let the time be long enough to cover all the proceedings,) *Thomas Larkin*, Esquire, whose name appears subscribed to the *within* certificate, was a justice of the peace in and for the said county, duly commissioned and sworn.

In witness whereof, I have hereunto set my hand
[L. S.] and affixed the seal of said court, this day
of 18 *Maurice Murphy.*

When a suit is appealed, the justice should return to the clerk of the circuit court all the papers and a transcript of the judgment he has given, certified as follows:

State of Illinois, }
La Salle county, } ss. I, the subscriber, a justice of the peace in and for the said county, do certify that the above transcript, and the papers annexed, contain a full and perfect statement of all the proceedings and of the judgment before me, in the above entitled cause.
Dated the day of 18 *Thomas Larkin.*

Bond for an appeal taken before a justice.

Know all men by these presents, that we, A. B. and C. D., are held and firmly bound unto *James Kerr*, in the penal sum of (here insert double the amount of judgment and costs) dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, and administrators, jointly, severally, and firmly, by these presents.

Witness, our hands and seals, this day of 18

The condition of the above obligation is such, that, whereas the said *James Kerr* did, on the day of 18 before *Thomas Larkin*, a justice of the peace for the county of *La Salle*, recover a judgment against the above bounden A. B., for the sum of dollars; from which judgment the said A. B. has taken an appeal to the circuit court of the county of *La Salle*, and state of Illinois. Now, if the said A. B. shall prosecute his appeal with effect, and shall pay whatever judgment may be rendered by the court upon dismissal or trial of said appeal, then the above obligation to be void, otherwise to remain in full force and effect. A. B. [L. S.]
C. D. [L. S.]

Approved by me at my office, this day of 18
Thomas Larkin,
Justice of the peace.

Execution in debt or assumpsit.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of said county, Greeting:

We command you, that of the goods and chattels of *John Doe*, in your county, you make the sum of *fifty* dollars and *fifty* cents debt, (or "damages," if in assumpsit,) and *three* dollars and *sixteen* cents costs, which *James Kerr* lately recovered before the undersigned, a justice of the peace of the said county,

in a certain plea against the said *John Doe;* and hereof make return to said justice within seventy days from this date.

Given under the hand and seal of the said justice, this day of 18 *Thomas Larkin*, Justice of the peace.

Form of execution in trespass.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county, Greeting:

We command you, that of the goods and chattels of *John Doe*, in your county, you make the sum of *fifteen* dollars and *twenty-five* cents damages, and *five* dollars and *fifty* cents costs, which *James Kerr* lately recovered before the undersigned, a justice of the peace in and for the said county, against the said *John Doe*, [for a certain trespass upon personal property committed by him,] whereof he is convicted, as appears to us by the docket of the said justice. And do you make return hereof to the said justice within seventy days from this date.

Given under the hand and seal of the said justice, the day of 18 *Thomas Larkin.* [L. S.]

In Trover.

(As in last form;) for converting and disposing of certain goods and chattels of the said *James Kerr*, by the said *John Doe*, whereof, &c. (Conclude as above.)

Execution in debt or assumpsit, by a justice to whom the docket and papers of another justice have been delivered over.

State of Illinois, }
county, } ss. The people of the state of Illinois to any constable of said county, Greeting:

We command you, that of the goods and chattels of in your county, you make the sum of dollars and cents, debt, (or damages,) and dollars and cents, costs, which on the day of 18 recovered before L. M., then a justice of the peace of said county, in a certain plea against the said as appears by the docket of said justice, heretofore delivered over to, together with his papers, and now remaining with, then the nearest justice of the peace of said county, upon the resignation (or death, or removal from the district in which he was elected) of said L. M.

And do you make return hereof, to the undersigned, within seventy days from this date.

Given under the hand and seal of the said this day of 18 J. P. [L. S.]

The same, in trespass.

State of Illinois, }
county, } ss. The people of the state of Illinois to any constable of the said county, Greeting:

We command you, that of the goods and chattels of in your county, you make the sum of dollars, damages, and dollars, costs, which on the day of 18 recovered before L. M., then a justice of the peace of said county, against the said for a certain trespass on personal property committed by him, whereof he is convicted, as appears to us by the docket of the said justice heretofore delivered over to, together with his papers, and now remaining with, then the nearest justice of the peace of the said county, upon the resignation (or death, or removal from the district in which he was elected) of the said L. M.

And do you make return hereof to the undersigned, within seventy days from this date.

Given under the hand and seal of the said this day of 18 J. P. [L. S.]

In trover.

As in the above form, except it should be stated to be "for converting and disposing of certain goods and chattels of the said by the said whereof he is," &c., as above.

An *alias* execution should commence: "We command you, as we have before commanded you, that," &c.

A *pluries* execution should begin: "We command you, as we have oftentimes before commanded you, that," &c.

Execution for the residue.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county, Greeting:

Whereas, by our writ, we lately commanded any constable of said county, that of the goods and chattels of in said county, he make dollars and cents, debt, (or "damages,") and dollars and cents, costs, which recovered before the undersigned, a justice of the peace of the said county, against the said and whereas, the constable returned the said execution, with an endorsement thereon, that he had made dollars and cents, parcel of the debt (or damages) and costs aforesaid, and that the said had no more goods and chattels of which to make the residue, and it now being alleged that the said hath other goods and chattels in the said county:

We therefore command you, that of the goods and chattels of the said you make the residue of the debt (or damages) and costs, to wit: (insert the amount due) and make return to the said justice, at his office in in said county, within seventy days from the date hereof.

Given under the hand and seal of the said this day of 18 J. P. [L. S.]

Execution to foreign county.

State of Illinois, }
county, } ss. The people of the state of Illinois to any constable of county, Greeting:

Whereas, an execution has been issued and directed to any constable of the county of on a judgment recovered before the undersigned, a justice of the peace of said county, in favor of against for dollars and cents, debt, (or damages,) and dollars and cents, costs, and the said constable has returned the said execution with an endorsement thereon, that the said hath no personal property in the county of of which to make and satisfy the same, (or that he has made the sum of dollars, parcel of the debt [or damages] aforesaid, and that the said has no more goods and chattels in the said county from which to make the residue;) and whereas, it is alleged that the said has personal property in the county of

Therefore, we command you, that of the goods and chattels of the said in your county, you make the sum of (insert the amount not collected,) and make return to the said justice at his office in in said county, within seventy days from the date hereof.

Given under the hand and seal of the said this day of 18 J. P. [L. S.]

Certificate of clerk of county commissioners' court to be attached to execution issued to foreign county.

State of Illinois, }
La Salle county, } ss. I, *Maurice Murphy*, clerk of the county commissioners' court of the said county, do hereby certify, that on the day of 18 (day of issuing execution) *Thomas Larkin*, whose name appears subscribed to the annexed execution, was a justice of the peace in and for the said county, duly commissioned and sworn.

In witness whereof I have hereunto set my hand and affixed the seal of the said court, this day of 18 *Maurice Murphy.*

[L. S.]

Finding of the jury on a claim of property. Ante, 485.

James Kerr }
v. }
John Doe. }

We, whose names are hereunto subscribed, and seals affixed, being a jury called to try a claim of property interposed by *Peter Grey* to the following goods and chattels, to wit: One horse, one saddle, &c., levied upon by virtue of an execution issued by *Thomas Larkin*, a justice of the peace, in the above entitled cause, do, upon our oaths say, that the property of the said goods and chattels is (or "is not," as the case may be) in the said *Peter Grey*. Witness our hands and seals, at this day of 18 } To be signed and sealed by the jurors.

Bond to indemnify constable in selling goods on execution.

Know all men by these presents, that we, *James Kerr* and *Thomas Nokes*, are held and firmly bound unto *Jesse Danforth*, a constable of the county of *La Salle*, in the sum of dollars, (double the value of the goods) to be paid to the said *Jesse Danforth*, ourselves, executors, or administrators, to which payment well and truly to be made, we bind our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the day of 18

Whereas, the said *Jesse Danforth*, as constable, as aforesaid, by virtue of a certain execution issued by *William Sly*, Esquire, a justice of the peace of the county of *La Salle*, against the goods and chattels of *John Doe*, in favor of the above bounden *James Kerr*, for one hundred dollars, hath levied upon [or is requested to levy upon] (one bay horse, one wagon, one set of one horse harness, &c., enumerating all the articles) with intent to sell the same in order to satisfy the said execution; but because such property is claimed to belong to one A. B., and because the said constable doth not know whether such claim be well founded or not,

Now, therefore, the condition of this obligation is such, that if the said *James Kerr* shall pay all such damages as the said *Jesse Danforth* may become liable for, and shall, at all times hereafter, keep him harmless and indemnified from all damages, costs, trouble, and expense which he may be put to, or sustain by reason of such levy and sale, or either of them, then this obligation to be void, otherwise to remain in force.

Sealed and delivered in the presence of } *James Kerr*, [L. S.] *Thomas Nokes*. [L. S.]

Notice to constable of claim of property and intention to prosecute the trial of the right thereto under the statute.

To *Jesse Danforth*, Constable:

SIR: I hereby claim property in the following goods and chattels, to wit: (describe the articles particularly,) levied upon by you, by virtue of an execution (or attachment) issued by *Thomas Larkin*, Esquire, a justice of the peace of *La Salle* county, and to you delivered, in favor of *James Kerr*, against the goods and chattels of *John Doe*, and intend to prosecute my claim to the same, according to the statute in such case made and provided. Dated, this day of 18

John Miles.

Notice of trial to the plaintiff.

John Miles v. *James Kerr.* } SIR:

Please take notice, that the following described property, to wit: (describe the property,) levied upon by virtue of an execution (or attachment) issued by *Jabez Fitch*, a justice of the peace of *La Salle* county, and in favor of *James Kerr* against the goods and chattels of *John Doe*, to me delivered, has been claimed by *John Miles*, who has notified me that he intends to prosecute his claim to the same according to the statute in such case made and provided.

You are, therefore, notified that the said claim will be tried before the said justice (or if he is absent from the county, or unable to attend, then say, "before L. M., a justice of the peace of the county of *La Salle*, the said *Jabez Fitch* being absent from said county," or "unable to attend") and the subscriber, and a jury then and there to be summoned and sworn, at the office of in in said county, on the day of 18 at o'clock in the noon. Dated this day of 18

To *James Kerr.* *Jesse Danforth*, Constable.

Subpœna for witness on trial of right of property.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to

You are hereby commanded to appear before a justice of the peace of the said county, and constable of the said county, at the office of the said in on the day of *instant*, (or next,) at o'clock in the noon, to testify before them and a jury of the county, on a claim of property made by to the goods and chattels levied upon by the said constable, by virtue of an execution (or attachment) to him delivered, in favor of against the goods

and chattels of and this you are not to omit under the penalty of the law.

Given under the hand and seal of the said justice, this day of 18 J. P. [L. S.]

Finding of the jury on a trial of the right of property.

George Stone v. *John Doe.* } Before Esquire, justice, and constable.

We, whose names are hereunto subscribed, being the jury called to try the right of property, on a claim made by to the following described goods and chattels, to wit: (describe them accurately,) levied upon by constable, by virtue of an execution (or attachment) issued by Esquire, a justice of the peace of the county of in favor of against the goods and chattels of do, upon our oaths, say that the property of the said goods and chattels so claimed is (or is not) in said claimant, (Or, if part only, say, of the following described articles, to wit: [describe them] part of the above so claimed, is in said claimant,)

Witness our hands, this day of 18

[To be signed by all the jurors.]

Execution for costs.

State of Illinois, } county, } ss. The people of the state of Illinois to to any constable of said county, Greeting:

We command you, that of the goods and chattels of in your county, you make the sum of dollars and cents, which lately recovered before the undersigned, a justice of the peace of the said county, for his costs by him laid out and expended in a certain trial of the right of property before the said justice, and constable of the said county, and a jury for that purpose summoned and sworn, wherein the said was claimant, and the said was defendant.

Given under the hand and seal of the said justice, the day of 18 J. P. [L. S.]

Forthcoming bond.

Know all men by these presents, that we, and are held and firmly bound unto a constable of the county of in the sum of dollars, (double the amount in the execution,) to be paid to the said constable as aforesaid, to which payment well and truly to be made, we bind

ourselves, our heirs, executors, administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the day of 18

Whereas, an execution has been issued by Esquire, a a justice of the peace of the county of and delivered to the above named constable, in favor of against the goods and chattels of under and by virtue of which the said constable has levied upon the goods and chattels following, to wit: twelve Windsor chairs, one looking-glass, one dining table, &c.

Now, therefore, the condition of this obligation is such, that if the said shall deliver the said goods and chattels to the said constable on the first day of next, at o'clock in the noon, at the dwelling house of the said so that the said goods and chattels may be then and there sold to satisfy the said execution, then this obligation to be void, otherwise to remain in full force.

Sealed and delivered } [L. S.]
in presence of } [L. S.]

Form of ca. sa. in debt or assumpsit.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county, Greeting:

Whereas, lately in a plea of debt, (or if in assumpsit, say in a plea of trespass on the case upon promises,) recovered before the undersigned, (or L. M.,) a justice of the peace of said county, the sum of dollars and cents, debt, (or in assumpsit, say damages,) and dollars and cents, costs, against as appears by the docket of said justice, (or if the docket containing the judgment has been delivered over to another justice, then say of L. M., a justice of the peace of said county, heretofore delivered over together with his papers to, and now remaining with, then the nearest justice of the peace of the said county, upon the resignation, or if for any other cause, insert it, of said L. M.;) and whereas, an execution issued upon said judgment against the goods and chattels of the said has lately been returned by a constable of said county, no property found; and whereas, the said has this day made oath before the undersigned, that the said is able to pay the said judgment, and fraudulently withholds the money, (or that he fraudulently secreted his property from said constable, so that the judgment aforesaid could not be levied.)

Now, therefore, we command you to take the body of the said if he shall be found in your county, and convey him to the common jail of said county, within seventy days from

the date hereof, there to remain until he shall pay and satisfy said the judgment aforesaid. And do you make return hereof as the law directs.

Given under the hand and seal of the said this day of 18 [L. S.]

Debt (or damages,) $

Costs, $

Collect interest from 18

Form of ca. sa. in trespass.

State of Illinois, }
La Salle county, } ss. The people of the state of Illinois to any constable of the said county, Greeting:

We command you to take the body of if he shall be found in your county, and convey him to the common jail of the said county, within seventy days from the date hereof, there to remain until he shall pay and satisfy *ten* dollars and *twenty-five* cents, damages, and dollars and cents, costs, which the said lately recovered before Esquire, a justice of the peace of said county, by reason of a certain trespass upon the personal property of said then lately committed by the said whereof the said is convicted, as appears by the docket of said justice, (or if the docket containing the judgment has been delivered over to another justice, state it as in the preceding form.) And do you make return hereof as the law directs.

Given under the hand and seal of the said this day of 18 J. P. [L. S.]

The above form is the proper one in trover, except it should state by "reason of the converting and disposing of certain goods and chattels of the said by the said whereof," &c., (as in the above.)

Official bond of justices of the peace.

Know all men by these presents, that we, and of the county of and state of Illinois, are held, and stand firmly bound and obliged, unto the county commissioners of the county of and their successors in office, for the use of the people of the state of Illinois, in the sum of dollars, (not less than five hundred nor more than one thousand dollars,) to be paid to the said county commissioners and their successors in office, for the use aforesaid: to the payment whereof, well and truly to be made, we bind ourselves, our executors, and administrators, firmly by these presents. Sealed with our seals, and dated this day of 18

Whereas, the said at an election held in precinct,

in the said county, on the day of 18 was duly elected to the office of a justice of the peace in and for said county:

Now, therefore, the condition of this obligation is such, that if the said shall justly and fairly account for and pay over all moneys that may come to his hands under any judgment, or otherwise, by virtue of his said office, and shall well and truly perform all and every act and duty enjoined on him by the laws of the state of Illinois, to the best of his skill and abilities, then the above obligation to be void, otherwise to be and remain in full force and effect. [L. S.]
[L. S.]
[L. S.]

State of Illinois, }
county, } ss. The above bond was executed, delivered to, and approved by, me, this day of 18
M. M.,
Clerk of the Co. Com. Court of said Co.

Constable's bond.

Know all men by these presents, that we, and of the county of and state of Illinois, are held, and stand firmly bound and obliged, unto the county commissioners of county, and their successors in office, for the use of the people of the state of Illinois, in the sum of one thousand dollars, to be paid to the said county commissioners and their successors in office, for the use aforesaid; to which payment well and truly to be made, we bind ourselves, our executors, and administrators firmly, by these presents. Sealed with our seals, and dated this day of 18

Whereas, the said at an election held in precinct, in said county, on the day of 18 was duly elected to the office of a constable in and for said county:

Now, therefore, the condition of this obligation is such, that if the said shall faithfully discharge the duties of said office, and justly and fairly account for, and pay over, all moneys that may come to his hands, under any process, or otherwise, by virtue of his said office, then the above obligation to be void, otherwise to be and remain in full force and effect. [L. S.]
[L. S.]
[L. S.]

State of Illinois, }
county, } ss. The above bond was executed, delivered to, and approved by, me, this day of 18
M. M.,
Clerk of the Co. Com. Court of said Co.

ERRATA.

Page 34	line 29	insert "as" after "soon."	
63	13	for "or" read "of."	
84	19	leave out "one vest."	
89	31	leave out "and."	
90	3	from bottom insert after "certain" "false, forged, and counterfeited."	
123	11	insert "above" before "bounden."	
129	10	leave out "two."	
147	5	from bottom, for "is" read "was."	
"	4	" "will" read "would."	
"	4	" "hath" read "had."	
"	1	" "hath" " "had."	
148	1	top "has" " "had."	
159	11	" the co. to be named.	
160	32	" for "separate" read "suspected."	
Page 277	line 10	for "reserved" read "received."	
321	4	for "recognizance" read "cognizance."	
368	18	for "of" read "in."	
391	8	insert "jointly" before "liable."	
405	15	leave out "a" before "debt."	
"	16	" "the" " "issue."	
407	1	insert 'to give' before 'in.'	
464	34	for "37" read "37½."	
476		last line, for "facie" read "facie."	
531	20	for "curselves" insert "his."	
531	21	insert "curselves" after "bind."	
299		last line, for "this" read "his."	

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